No. _____

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-1181

CITY OF SANTA FE, a municipal corporation, and BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, a political subdivision of the State of New Mexico,

Petitioners,

vs.

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico corporation,

Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

_____

HARRY E. CONNELLY, JR.
Special Assistant City Attorney
Post Office Box 1565
Santa Fe, New Mexico 87501
Attorney for Petitioner
City of Santa Fe

JAMES E. ROGERS, JR.
Special Assistant District Attorney
Address
Post Office Box
Santa Fe, New Mexico 87501
Attorney for
Board of County Commissioners

February 20, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

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CITY OF SANTA FE, a municipal corporation, and BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, a political subdivision of the State of New Mexico,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of New Mexico entered in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico (App. A., *infra*) is reported at 503 P.2d 323. It has not yet appeared in the New Mexico Reports.

JURISDICTION

The judgment of the Supreme Court of the State of New Mexico was entered on November 22, 1972, The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Sangre de Cristo Development Company, Inc., a New Mexico corporation solely owned by non-Indians, has leased vacant Indian land in Santa Fe County near the City of Santa Fe for the purpose of subdividing and subleasing lots for sale to the general public. New Mexico statutes grant to the City and County of Santa Fe planning and platting authority and subdivision control over land where the leased land is located.

The question presented is whether federal law, by preemption or otherwise, prevents the City and County of Santa Fe from exercising planning and platting authority and subdivision control over the leasehold interest of Sangre de Cristo Development Company, Inc.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are: 25 U.S.C. Sec. 415(a); 25 C.F.R. Sec. 1.4 and Secs. 131.1 through 131.14; Secs. 14-19-1 through 14-19-14 and Secs. 70-3-1 through 70-3-9, N.M.S.A., 1953 Comp. These statutes and regulations are set forth in Appendix B, *infra*.

STATEMENT OF CASE

On or about April 17, 1970 Respondent Sangre de Cristo Development Company, Inc. ("Sangre"), a New Mexico corporation solely owned by non-Indians, leased for 99 years from the Pueblo of Tesuque, an Indian tribe, approximately 5,000 acres of vacant land for Sangre to subdivide into lots and offer subleases of the lots for sale to the general public. The land leased

lies within the boundaries of Santa Fe County, a political subdivision of the State of New Mexico, and a substantial portion of the land leased lies within 5 miles of the city limits of the City of Santa Fe, a municipal corporation. The lease was approved by the Secretary of the Interior on May 24, 1970 pursuant to 25 U.S.C. Sec. 415(a) as then in effect. Thereafter, Sangre prepared a master subdivision plan for the use of the land and a subdivision plat of a portion lying within 5 miles of the city limits of Santa Fe. Sangre then began offering for sale subleases of the lots and actually has sold subleases to over 100 of the lots. At no time to date has Sangre ever submitted the plat to, or obtained approval thereof from, the governing bodies of the County and City of Santa Fe as required by Secs. 14-19-1 through 14-19-14 and Secs. 70-3-1 through 70-3-9, N.M.S.A., 1953 Comp.

After learning of the City and County's intention to assert planning and platting authority and subdivision control over Sangre's subdivision, Sangre instituted an injunctive action in the district court of Santa Fe County against the City and County seeking to prevent them from exercising any jurisdiction over Sangre and its subdivision on the ground that the leased land is under the absolute jurisdiction and control of the Congress of the United States. The City and County denied the material allegations of Sangre's complaint and each counterclaimed against Sangre seeking to enjoin Sangre from selling any leasehold interests in the leased land until it had complied with the provisions of New Mexico law cited above giving the City and County planning and platting authority and subdivision control over land within boundaries of the County and within 5 miles of the city limits. The state district court granted the injunctive relief sought by Sangre and denied the relief sought by the City and County in their counterclaims.

On appeal the Supreme Court of New Mexico denied the injunctive relief granted to Sangre on the ground there was no jurisdiction over the City and County by virtue of governmental immunity. It also denied the injunctive relief sought by the City and County in their respective counterclaims on the ground that the planning and platting authority and subdivision control

sought to be exercised by the City and County over Sangre's leasehold had been preempted by or reserved unto the United States (App. A, p. 13a). The City and County seek review by this Court of that part of the decision of the Supreme Court of New Mexico denying the relief sought by them against Sangre in their counterclaims.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of New Mexico Has Decided a Federal Question of Substance not Heretofore Determined by this Court and in Immediate Need of Determination.

For over 140 years since *Worcester v. Georgia*, 6 Pet. 515 (1832) this Court has been concerned with the substantial federal question of state jurisdiction over Indians, Indian land and the activities of non-Indians on it. During that period state jurisdiction has evolved substantially from the nonexistent condition found in *Worcester* to the substantial residual jurisdiction found in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). There, Justice Frankfurter reviewed the decisions of this Court on the power of the States, when not granted specific authority by Congress, to regulate matters affecting Indians and concluded:

> "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." (369 U.S. 60 at 75)

This case raises the specific question of state jurisdiction over the development of Indian land by a non-Indian lessee which has not been decided by this Court. The question arises by virtue of 25 U.S.C. Sec. 415 originally enacted in 1955.[1] It permits long-term leases of Indian lands for residential, business and other purposes. It arose out of a Congressional recognition of the need for Indians to be able to utilize their land in new ways

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1. Chap. 615, Pub. L. 255, 69 Stat. 539 (1955)

for economic benefit. H.R. Rep. No. 1093, 84th Cong., 1st Sess. (1955). Specifically, 25 U.S.C. Sec. 415(a) permits 99-year leases of land from 18 different Indian tribes or communities owning millions of acres, much of which is located in New Mexico and Arizona. A 1968 amendment[2] to 25 U.S.C. Sec. 415(a) added the lands of the Pueblos of Cochiti, Pojoaque, and Tesuque, all located generally in a triangular area formed by the cities of Albuquerque, Santa Fe, and Los Alamos.

Non-Indian land speculators and developers were quick to recognize the growing demand for land in the relatively unspoiled environment of northern New Mexico. Shortly after the 1968 amendment to 25 U.S.C. Sec. 415(a) a notorious California land subdivider entered into a 99-year lease from the Pueblo of Cochiti and thereafter Sangre obtained its 99-year lease from the Pueblo of Tesuque. The prominent selling activities of the lessees, particularly their representations about the future population of these subdivisions and their immunity from state and local law, immediately attracted the attention of state and local officials. These officials realized that orderly growth required subdivisions near urban centers to be subject to the same controls as all other subdivisions. Consequently, the question of state jurisdiction over the Cochiti subdivision soon found itself in federal court. *State ex rel Maloney v. Russel,* D.C.N.M., No. 8745 - Civil. Then the question of state and local jurisdiction over Sangre's subdivision arose both in state court through this case and in federal court through a declaratory judgment action instituted by the State Attorney General against Sangre which is presently pending in the United States District Court for the District of New Mexico as *Norvell v. Sangre de Cristo Development Company, Inc.*, No. 9106 - Civil.

Many other of the 18 Indian tribes authorized by 25 U.S.C. Sec. 415(a) to enter into 99-year leases are planning residential subdivision development of their lands and the question of state and local jurisdiction over these subdivisions inevitably arises. Because the question has no definitive, legal answer, the buying

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2. Pub. L. 90-570, 82 Stat. 1003 (1968)

public, the subdivider lessees and the Indian lessors must make business decisions in an area of uncertainty.[3] A recent study on the leasing of Indian lands concluded this uncertainty has created an "emergency" situation.[4]

Thus, this Court needs to give an immediate, definitive answer to the question of state and local jurisdiction over a non-Indian leasehold of Indian land. The Supreme Court of New Mexico has given an answer but it appears to be wrong.

2. The Supreme Court of New Mexico Has Decided a Federal Question of Substance in a Way Probably Not in Accord with the Applicable Decisions of this Court.

In its opinion the Supreme Court of New Mexico applied the principle stated above in *Kake Village* and concluded:

> "There is no evidence in the record which would support a finding that the exercise by defendants [the City and County] of their claimed subdivision, planning and platting authority over the lands would interfere with the self-government of the Pueblo, and no such finding was made by the trial court." (App. A., p. 13a)

The Supreme Court of New Mexico, however, went on to hold that the City and County have no subdivision, planning and platting authority over the property in question because the United States has preempted or reserved unto itself such authority. (App. A., p. 13a). Accordingly, it denied the counterclaims of the City and County. To support its holding, the Supreme

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3. In *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) all parties were surprised to learn that the lessees of Indian land would have to pay California's possessory interest tax.
4. Monroe E. Price and Reid P. Chambers, *The Role of the Interior Department in the Leasing of Indian Lands*, June 7, 1972 (prepared for the Committee on Claims Adjudication of the Administrative Conference of the United States) at p. 123.

Court of New Mexico relied upon: (1) the 1970 amendment to 25 U.S.C. Sec. 415(a); (2) 25 C.F.R. Sec. 1.4; (3) 25 C.F.R. Secs. 131.1 through 131.14; and (4) *Warren Trading Post Company v. Arizona Tax Commission*, 380 U.S. 685 (1965).

The lease was entered into and approved by the Secretary prior to the effective date of the 1970 amendment[5] to 25 U.S.C. Sec. 415(a) which added:

> "Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject."

Even if the foregoing amendment were applicable to Sangre's lease, there is nothing in its language indicating an intention to preempt the subdivision, planning and platting authority over Sangre's leasehold given to the City and County of Santa Fe by New Mexico law. It simply directs the Secretary to satisfy himself on certain environmental, safety and practical considerations before approving the lease.

25 U.S.C. Sec. 415(a) requires all leases to be made under the terms and regulations prescribed by the Secretary. They appear in 25 C.F.R. Secs. 131.1 through 131.14. These regulations deal with such obvious matters as negotiation, advertisement and duration of leases. Not even the regulation dealing with special requirements and provisions (25 C.F.R. Sec. 131.5) contains anything relevant to subdividing, planning and platting of the

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5. Pub. L. 91-275, 84 Stat. 303, approved June 2, 1970.

land leased. In fact, one paragraph requires the lessee to agree "that he will not use. . .the leased premises for any unlawful conduct or purpose." 25 C.F.R. Sec. 131.5(g) (3). Rather than preempting the application of state law, this suggests a reference to state law to determine whether any conduct or purpose is unlawful.

On the other hand, the language of 25 C.F.R. Sec. 1.4 clearly attempts to preempt state jurisdiction over the subdividing, planning and platting of land leased from an Indian tribe. The Secretary of the Interior, however, had no authority to make this regulation. Two sources are given as authority for the Secretary to issue 25 C.F.R. Sec. 1.4. The first source is 5 U.S.C. Sec. 301 which simply gives the Secretary, as well as any other federal department head, "housekeeping" authority. *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868 (4th Cir. 1961). It confers administrative not legislative power. *U.S. v. George*, 228 U.S. 14 (1913). The second source is 25 U.S.C. Sec. 2 but this statute and 25 U.S.C. Sec. 9 granting to the President the power to prescribe regulations for the conduct of Indian affairs do not embody a general grant of power to make rules for Indian conduct but are merely authority to implement specific laws and govern relations between the United States and Indians. *Organized Village of Kake v. Egan, supra.* The authority for the Secretary to issue 25 C.F.R. Sec. 1.4 was considered in *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971). The court noted that, other than 25 U.S.C. Secs. 2 and 9, it was "unaware of any other authority for the Secretary to issue a 'legislative' type of administrative regulation in this area". (324 F. Supp. 371 at 378).

Finally, in *Warren Trading Post, supra,* this Court held the State of Arizona had no authority to levy a gross receipts tax on the receipts of a federally licensed Indian trader from trading with reservation Indians on the Navajo Indian Reservation. It found a comprehensive scheme of federal regulation of Indian traders that left no room for the application of state law. There is no comparable federal regulation of non-Indian lessees of Indian land. Sangre did not need a federal license nor did it have

to meet detailed federal conditions to be eligible to enter into the lease.

The Supreme Court of New Mexico erroneously applied the federal preemption doctrine of *Warren Trading Post* and ignored decisions of this Court upholding state jurisdiction over non-Indian lessees of Indian land. *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949) upholding a state tax on the production of petroleum assessed against non-Indian lessees of Indian land; *Thomas v. Gay*, 1969 U.S. 264 (1898) upholding a territorial tax on the cattle of non-Indian lessees of reservation land. See also *Utah & Northern Railway Company v. Fisher*, 116 U.S. 28 (1885). The Supreme Court of New Mexico also ignored decisions of this Court upholding state jurisdiction over non-Indian criminal conduct on Indian land. *New York ex rel Ray v. Martin*,326 U.S. 496 (1946); *U.S. v. McBratney*, 104 U.S. 621 (1882). It should be noted that the New Mexico law relied upon by the City and County of Santa Fe contains criminal sanctions Secs. 14-19-13 and 70-3-7, N.M.S.A., 1953 Comp. (App. B).

While the foregoing decisions of this Court do not specifically deal with state subdivision, planning and platting jurisdiction over a non-Indian leasehold of Indian land, they clearly indicate that the decision of the Supreme Court of New Mexico is probably not in accord with them.

3. The Decision of the Supreme Court of New Mexico Conflicts with a Decision of the Ninth Circuit and Decisions of the Arizona Court of Appeals now pending for Review by this Court.

The Supreme Court of New Mexico held that the City and County of Santa Fe have no subdivision, planning or platting authority over Sangre's leasehold interest because of federal preemption. This holding conflicts with the holding of the Ninth Circuit in *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). There the Court of Appeals upheld a California possessory interest tax imposed upon lessees of Indian land in the

area of Palm Springs, California in reliance upon the decision of this Court in *Oklahoma Tax Commission v. Texas Co., supra.* If California has jurisdiction to tax the possessory interests (the right to possess improvements) on leased Indian land, there is no legal reason why New Mexico and its political subdivisions should not have jurisdiction to regulate in a reasonable and uniform manner the creation of improvements on leased Indian land. State power to regulate improvements through the exercise of subdivision, planning and platting authority is not as extensive as state power to tax the improvements.

There are two Arizona cases presently pending on appeal before this Court that indicate state jurisdiction over both Indians and non-Indians deriving income on Indian land is more extensive than the Supreme Court of New Mexico acknowledged in this case. *McClanahan v. State Tax Commission,* 14 Ariz. App. 452, 484 P.2d 221 (1971); *Kahn v. State Tax Commission,* 16 Ariz. App. 17, 490 P.2d 846 (1972). *McClanahan* held Arizona had the power to tax the income of Indians earned on the Navajo Reservation. *Kahn* held Arizona had the power to tax the income of a non-Indian lawyer employed by the Navajo tribe over the contention that the regulations of the Secretary of the Interior governing the hiring of lawyers for Indian tribes preempted the area so as to preclude Arizona from taxing Kahn's income. State power to tax the income of both Indians and non-Indians earned on Indian land appears more extensive than state power to regulate the development of a non-Indian leasehold interest in Indian land. Thus, these Arizona decisions appear to conflict with the decision of the Supreme Court of New Mexico whose review the City and County of Santa Fe seek in this Petition.[6]

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6. The decision of the Supreme Court of New Mexico in this case is in accord with *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967) in which Justices Douglas and White dissented from the denial of certiorari in an extensive dissenting opinion.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition for a Writ of Certiorari should be granted.

HARRY S. CONNELLY, JR.
Special Assistant City Attorney

Attorney for Petitioner
City of Santa Fe

JAMES B. ALLEY, JR.
Special Assistant District Attorney

Attorney for Petitioner
Board of County Commissioners

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

SANGRE DE CRISTO DEVELOPMENT CORPORATION, INC.,
Plaintiff-Appellee,

vs. NO. 9441

CITY OF SANTA FE and BOARD OF COUNTY
COMMISSIONERS OF SANTA FE COUNTY, NEW MEXICO
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF
SANTA FE COUNTY
ZINN, Judge

OLMSTED, COHEN & BINGAMAN
STANDLEY, WITT & QUINN
KEGEL & McCULLOH
Santa Fe, New Mexico — *Attorneys for Appellee*

HARRY S. CONNELLY, JR.,
Special Assistant City Attorney for
City of Santa Fe
Santa Fe, New Mexico

JOHN WENTWORTH
Deputy District Attorney for
Board of County Commissioners
Santa Fe, New Mexico — *Attorneys for Appellants*

PER CURIAM

The opinion issued in this cause on September 22, 1972, is withdrawn and the following opinion substituted therefor. The Motions for Rehearing are otherwise denied.

OPINION

OMAN, Justice.

Sangre de Cristo Development Corporation, Inc., hereinafter called plaintiff, sought an injunction against defendants, the City of Santa Fe and the Board of County Commissioners of Santa Fe County. Each defendant filed a counterclaim by which

it sought an injunction against plaintiff. The City also filed a separate suit against plaintiff in the same court the day after plaintiff's suit was filed. In this suit by the City it also sought an injunction against plaintiff. The Chief Justice of this Court designated the same trial judge to preside over both cases.

A judgment was entered in the cause filed by plaintiff by which defendants were permanently enjoined and restrained from exercising over lands in the Pueblo of Tesuque all platting and planning authority and subdivision control conferred upon defendants by Secs. 14-18-1 through 14-20-24, N.M.S.A. 1953 (Repl. Vol. 3, 1968) and Secs. 70-3-1 through 9, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp. 1971). No ruling by the trial court was made upon the defendants' counterclaims, except to the extent that it can be said the judgment granting the plaintiff an injunction was inconsistent with the claims of defendants for injunctive relief against plaintiff.

In the cause filed by the City against plaintiff, an Order of Dismissal was entered for the recited reason that "[a] 11 matters herein having been disposed of in cause No. 43,218 [the suit filed by plaintiff] the above cause [No. 43,223] is hereby dismissed."

Appeals were taken by defendants from the judgment and an appeal was taken by the City from the Order of Dismissal. However, at no time in the briefs, except for references thereto in the "Statement of the Causes" and the "Statement of Proceedings" in their brief in chief, is any reference made by the defendants to the Order of Dismissal. No error is claimed on the part of the trial court in entering this order, no argument is directed against the substance of the order or the action of the trial court in entering it, and defendants in their brief in chief urged that "* * * the District Court's Judgment should be reversed and a Judgment granting the relief sought by Appellants [defendants] against Appellee [plaintiff] in the District Court should be entered by the District Court."

The one point relied upon for reversal by defendants, which in any way relates to their claims of right to injunctive relief against plaintiff, is stated by them as follows:

"POINT IV

"THE DISTRICT COURT SHOULD HAVE GRANTED A PERMANENT INJUNCTION TO APPELLANTS, RESTRAINING APPELLEE FROM FURTHER VIOLATING SECTIONS 14-19-1 ET SEQ., NMSA 1953 COMP., AND SHOULD HAVE GRANTED TO APPELLANT, COUNTY OF SANTA FE, A PERMANENT INJUNCTION RESTRAINING APPELLEE FROM FURTHER VIOLATING SECTION 70-3-1 THROUGH 70-3-9, AS AMENDED, NMSA 1953 COMP."

In their argument under this point, their claim is that they were entitled to injunctions under a Stipulation of Facts which was filed in the suit brought by plaintiff and in which the judgment enjoining defendants was entered. Obviously defendants had to be relying on their counterclaims in the plaintiff's suit as the basis for their Point IV, and not on the City's complaint in the other cause, or on the Order of Dismissal entered therein. The County was not a party to the suit brought by the City.

If the City intended to claim error on the part of the trial court in entering the Order of Dismissal, it was the City's duty to clearly assert this claim [*Morris v. Merchant*, 77 N.M. 411, 423 P.2d 606 (1967); *Cochran v. Gordon*, 77 N.M. 358, 423 P. 2d 43 (1967); *Novak v. Dow*, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970)], and then to present argument and authority in support thereof [*Sproule Const. Co. v. St. Paul Fire & Marine Ins. Co.*, 74 N.M. 189, 392 P.2d 339 (1964); *Gibbs v. Whelan*, 56 N.M. 38, 239 P.2d 727 (1952); *Spain Management Co. v. Packs' Auto Sales*, 54 N.M. 64, 213 P.2d 433 (1950); *Wilson v. Albuquerque Board of Realtors*, 82 N.M. 717, 487 P.2d 145 (Ct. App. 1971); *Novak v. Dow, supra*]. This the City failed to do. Thus, neither the Order of Dismissal nor the cause in which the order was entered is before us on this appeal.

We reverse the judgment by which defendants were enjoined and restrained. We do so on the jurisdictional issue of governmental immunity raised by defendants. This issue of governmental immunity arises from the fact that plaintiff sued defendants as governmental entities. The councilmen and commissioners of defendants were not sued as individuals.

We also feel constrained to decide the principal issue involved in this case, to wit, the right of defendants to exercise planning and platting authority and subdivision control over lands lying within the Pueblo of Tesuque. We decide this issue because of its great public importance; because this issue was fully briefed and argued by both sides on this appeal; and because defendants have expressly urged in their Point IV, *supra*, and in their arguments thereunder, as well as in their arguments under other points relied upon by them for reversal, that we resolve this issue. The jurisdictional question of governmental immunity is not applicable and has not been raised in relation to the claims asserted by defendants against plaintiff in their counterclaims.

It is true defendants have taken the position in their motions for rehearing that this issue should not have been decided by us, but this position is completely inconsistent with the position they took in their brief in chief, their reply brief, and their oral arguments, except for the fact that they wanted the issue resolved in their favor.

We affirm the trial court's implied refusal to grant the defendants' counterclaims for injunction against Sangre de Cristo. These counterclaims remain before this court for determination even though the original claim by Sangre de Cristo fails on jurisdictional grounds. As stated in *Manufacturers Cas. Ins. Co. v. Arapahoe Drilling Co.*, 267 F.2d 5 (10th Cir. 1959):

> "* * * [I]t is apparent in those exceptional cases where a counterclaim may survive the jurisdictional failure of a complaint that at least three premises must exist. Jurisdiction must exist within the scope of the allegations of the counterclaim; the claim made in the counterclaim must be independent of that made in the main case; and, lastly, affirmative relief must be sought."

All of these premises exist in the present case.

Defendants contend the district court lacked jurisdiction over them to grant the injunctive relief sought by plaintiff, because of their governmental immunity from suit as political subdivisions of the State. Neither of them nor the State has given permission or consent for this suit against them. Regardless of

what may be the law in other states, this Court has consistently held the State of New Mexico may not be sued in its courts without its permission or consent. *Nevares v. State Armory Board*, 81 N.M. 268, 466 P.2d 114 (1969); *State v. Burks*, 75 N.M. 19, 399 P.2d 920 (1965); *State v. Town of Grants*, 69 N.M. 145, 364 P.2d 853 (1961); *Maes v. Old Lincoln County Memorial Commission*, 64 N.M. 475, 330 P.2d 556 (1958); *Livingston v. Regents of New Mexico Col. of A. & M.A.*, 64 N.M. 306, 328 P.2d 78 (1958); *Swayze v. Bartlett*, 58 N.M. 504, 273 P.2d 367 (1954); *Day v. Penitentiary of New Mexico*, 58 N.M. 391, 271 P.2d 831 (1954); *Hathaway v. New Mexico State Police*, 57 N.M. 747 (on reh. 758), 263 P.2d 690 (1953); *Vigil v. Penitentiary of New Mexico*, 52 N.M. 224, 195 P.2d 1014 (1948); *Arnold v. State*, 48 N.M. 596, 154 P.2d 257 (1944); *New Mexico State Highway Department v. Bible*, 38 N.M. 372, 34 P.2d 295 (1934); *Dougherty v. Vidal*, 37 N.M. 256, 21 P.2d 90 (1933); *State ex rel. Evans v. Field*, 27 N.M. 384, 201 P. 1059 (1921). See also *McWhorter v. Board of Education*, 63 N.M. 421, 320 P.2d 1025 (1958); *State v. District Court of Fourth Judicial Dist.*, 51 N.M. 297, 183 P.2d 607 (1947); *Am. Trust & Sav. Bnk. of Alb. v. Scobee, et al.*, 29 N.M. 436, 224 P.788 (1924); *Locke v. Trustees of New Mex. Reform School*, 23 N.M. 487, 169 P. 304 (1917).

Also in New Mexico, municipalities, such as the City of Santa Fe, are clothed with this immunity from suit, insofar as their governmental functions are concerned. *Montoya v. City of Albuquerque*, 82 N.M. 90, 476 P.2d 60 (1970); *Hammell v. City of Albuquerque*, 63 N.M. 374, 320 P.2d 384 (1958); See also *McWhorter v. Board of Education, supra*; *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943). This is also true as to counties. *Elliott v. Lea County*, 58 N.M. 147, 267 P.2d 131 (1954); *Murray v. County Commissioners*, 28 N.M. 309, 210 P.1067 (1922).

A reference to the foregoing cited cases shows that in New Mexico the doctrine of governmental immunity has not only been adhered to in tort cases or in cases in which there is likely to be a direct and adverse effect upon the public treasury, but in other types of cases as well.

This Court has also repeatedly held that if any change in this policy of immunity from suit is desired by the people of this State, this change can and should be accomplished through legislative action. *Montoya v. City of Albuquerque, supra*; *Clark v. Ruidoso-Hondo Valley Hospital*, 72 N.M. 9, 380 P.2d 168 (1963); *State v. Town of Grants, supra*; *City of Albuquerque v. Campbell*, 68 N.M. 75, 358 P.2d 698 (1960); *Livingston v. Regents of New Mexico Col. of A. & M.A., supra*; *Elliott v. Lea County, supra.*

Plaintiff seeks to avoid the effect of the decisions in these many cases. It predicates this effort in part upon the fact that a county was held subject to suit in *Donalson v. San Miguel County*, 1 N.M. 263 (1859), and reference was made to that case in *Wylie Bros. C.C. v. Albuquerque-Bernalillo C.A.C.B.*, 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969). The decision in the *Donalson* case was clearly predicated upon the court's construction of a territorial statute that the county could sue or be sued. In the opinion it is stated: "It must be conceded, that upon known legal principles, no county can sue or be sued, unless such proceeding shall be authorized by the legislative authority within the state or territory. * * *"

As already stated, there is no legislative authority supporting plaintiff's suit against the defendants.

The mere reference to the *Donalson* case in the *Wylie* decision in no way supports plaintiff's contention that a county may sue or be sued absent legislative authority. Nothing said in *Allen v. McClellan*, 77 N.M. 801, 427 P.2d 677 (1967), can properly be construed as supporting plaintiff's position.

Plaintiff's contention that defendants waived their right to assert sovereign immunity is not supported by the record. In any event, they could properly have raised it for the first time in this Court. *Maes v. Old Lincoln County Memorial Commission, supra.*

Plaintiff further contends this is a jurisdictional question [*Maes v. Old Lincoln County Memorial Commission, supra*]; a jurisdictional question must be raised and considered by this Court on its own motion, if the parties fail to raise it; and, since

we reversed the trial court on the merits of the case and not on jurisdictional grounds in *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961), there follows logically the conclusion that this Court in *Your Food Stores* decided a municipality may properly be sued and enjoined from performing governmental functions without legislative authority or consent for the suit. There is little merit to this argument. In a case in which the jurisdictional question is not raised by the parties or by the appellate court itself, it is presumed the appellate court decided the jurisdictional question and this decision becomes the law of the case. However, this appears to be the total effect of deciding a case in which jurisdiction is lacking but overlooked on appeal. *Varney v. Taylor*, 79 N.M. 652, 448 P.2d 164 (1968).

This Court, by mere inference or presumption, cannot logically be considered to have overruled the long line of cases, *supra*, which have expressly dealt with the subject of sovereign immunity. The general rule is that cases are not authority for propositions not considered. *McDowell and Craig v. City of Santa Fe Springs*, 54 Cal.2d 33, 4 Cal.Rptr. 176, 351 P.2d 344 (1960), and cases cited therein. See also *Miller v. DeWitt*, 59 Ill. App.2d 38, 208 N.E.2d 249 (1965). Likewise, the United States Supreme Court has long held that it "* * * is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed upon *sub silento*." *United States v. Tucker Truck Lines*, 344 U.S. 33, 38, 73 S.Ct. 67, 69, 97 L.Ed. 54, 59 (1952), and cases cited therein.

This Court has adhered to the "right or wrong" rule as stated in *Varney v. Taylor, supra*. See also *Sanchez v. Torres*, 38 N.M. 556, 37 P.2d 805 (1934). In the *Varney* case, it was stated: "* * * [W]hat amounts in effect to an adjudication of the issue on a *prior* appeal, right or wrong, has become the law of the case, and is binding alike upon us and the litigants in *all subsequent proceedings in the case.* * * *" [Emphasis added.] Thus, the clear indication is that the "law of the case" or "right or wrong" doctrine is binding only on those persons who were parties or privies to that particular action. It is merely an aspect of the doctrine of *res judicata*. See *Freeman on Judgments*, Sec.

709 at 1496-1497 (1925). See also *Treinies v. Sunshine Min. Co.*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939). Following this rationale, in ruling expressly on the effect of the failure of the parties to raise the defense of governmental immunity on appeal and the silence of this Court on that issue in a prior case, it was held:

> "Appellee calls attention to the case of *Scofield v. Lordsburg Municipal School District*, 53 N.M. 249, 205 P.2d 834, wherein the court affirmed the lower court's award of compensation to an employee of a school district who was injured while performing extrahazardous work. The question of consent to the suit was not raised and therefore not treated by the court. Silence on a point not raised in that case is of no aid to the appellee here."

McWhorter v. Board of Education, supra.

Since there is no statute authorizing the plaintiff to sue defendants in the case now before us, and since the functions which defendants claim they have the authority to exercise over the land are governmental rather than corporate, it appears clear from the New Mexico law, as set forth in the foregoing cited cases, that the trial court erred in rejecting the defense of sovereign immunity asserted by each of the defendants.

We turn now to the defendants' counterclaims for injunctions against the plaintiff. These injunctions may only be granted if the City and County have planning and platting authority and subdivision control over Indian lands lying within an Indian Pueblo. The question now before us is whether they have those powers.

The facts of this case are largely before us by stipulation. The lands in question belong to the Pueblo of Tesuque – an Indian Tribe recognized by the United States Department of Interior – and are a portion of the lands which lie within the Pueblo. They also lie within the exterior boundaries of Santa Fe County, and a substantial portion thereof lie within five miles of the municipal limits of the City of Santa Fe.

The Pueblo acquired title to the land by a patent from the

United States of America dated November 1, 1864. This patent was issued pursuant to an Act of Congress approved December 22, 1858, and entitled "An Act to Confirm the Land Claim of Certain Pueblos and Towns in the Territory of New Mexico." (11 Stat. 374).

The Pueblo leased these lands to plaintiff, a New Mexico corporation, for a period of 99 years. This lease was dated April 17, 1970, and was approved by the Albuquerque Area Director of the Bureau of Indian Affairs of the United States Department of Interior on May 24, 1970, pursuant to 25 U.S.C. Sec. 415.

Pursuant to the lease, plaintiff prepared a master subdivision plan for use of the land. This plan was approved by the Secretary of the Interior and by the Pueblo on or before December 14, 1970. Plaintiff also prepared a subdivision plat of that portion of the land lying closest to the limits of the City of Santa Fe. This plat was also approved by the Secretary of the Interior and by the Pueblo on or before December 14, 1970. According to this plat, plaintiff proposed to subdivide that portion of the land shown thereon into more than 25 parcels, tracts or lots of less than five acres each, which it proposed and proposes to sublease to others for building purposes. In fact, during the year 1970, but subsequent to the entry by the district court of the Temporary Restraining Order directed against defendants, plaintiff subleased not less than 100 of these parcels, tracts or lots to others by reference to and exhibition of said plat without ever submitting the plat to or obtaining the approval thereof from either defendant.

The defendant City is a municipal corporation and a political subdivision of the State of New Mexico, and has a population of more than 25,000 persons. It claims planning, platting and zoning authority over those lands lying within five miles of its municipal boundary by reason of Secs. 14-18-1 through 14-20-24, *supra*, and has instructed its attorney to seek an injunction against the activities of plaintiff in platting, planning and subleasing the lands in question as aforesaid.

The defendant County claims platting and subdivision control

over the lands in question pursuant to the provisions of Secs. 70-3-1 through 9, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp. 1971).

Defendants contend Art. XXI, Sec. 2 of the New Mexico Constitution does not preclude the applicability to the lands of valid State laws requiring platting and planning approval by defendants. We agree, but we are of the opinion that Congress has taken over the subdivision, platting and planning control of these lands so fully and completely that no room remains for the application of State laws imposing additional and inconsistent subdivision, platting and planning control.

Regardless of what may have been the historical attitude toward and the development of the legal status of the Pueblo Indians and their Pueblo lands in New Mexico, the Congress and the Supreme Court of the United States, about the time New Mexico became a State, largely changed this attitude and status and considered the legal status of Pueblo Indians and their lands as being identical with that of the peoples of recognized Indian Tribes and their reservation lands, except where treaties or special Congressional Acts were applicable. See the following authorities as to the early law concerning Pueblo Indians and their lands: *United States v. Joseph*, 94 U.S. 614, 24 L.Ed. 295 (1876); *United States v. Lucero*, 1 N.M. 422 (1869); *United States v. Santistevan*, 1 N.M. 583 (1874); *United States v. Varela*, 1 N.M. 593 (1874); *Territory v. Delinquent Taxpayers*, 12 N.M. 139, 76 P. 307 (1904); *United States v. Mares*, 14 N.M. 1, 88 P. 1128 (1907); Cohen, *Handbook of Federal Indian Law* at 383, 384, 387, 388 (1942). Note the changed views accomplished by and recognized in *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913); *United States v. Candelaria*, 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); Art. XXI, Sec. 2, *Constitution of New Mexico*. See also Cohen, *Handbook of Federal Indian Law* at 389.

There no longer remained any doubt about Pueblo Indians being Tribes, Pueblo lands being Indian Country, and Pueblo Indians being wards of the United States of America occupying a special status of tutelage. *United States v. Chavez*, 290 U.S. 357, 54 S.Ct. 217, 78 L.Ed. 360 (1933). The United States,

through Congress, if it so elected, could exert total governmental control over Indian Country, and this it has done in varying degrees at different times in different areas of Indian Country and in different areas of governmental control.

Under the concepts announced in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), which were relied on to a considerable extent in *Your Food Stores, Inc. (NSL) v. Village of Espanola, supra*, title to Indian Country meant more than title within the ordinary proprietary concepts of our law of real property. Rather, it meant all aspects of sovereign governmental control. These concepts – of Indians being foreign people and Indian Country being a foreign land – are totally inconsistent with the citizenship of Indians in the United States and in the various states in which they reside and with the inclusion of their lands within and as a part of the territory of the United States and of the states in which they lie. New Mexico Indians, as are Alaska Indians, are voting citizens and some of them occupy prominent public offices in state and local governments. *Metlakatla Indians v. Egan*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962); *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962). There are at least two Indian members of our present New Mexico Legislature; under Rule 16 of our Rules of Criminal Procedure, Indian Tribal and Pueblo law enforcement officers have equal authority with full-time salaried State or county law enforcement officers, municipal police officers and campus security officers to serve arrest warrants; at least two Indians served as New Mexico delegates to the recently held National Republican Convention; a prominent Indian recently served as Chairman of the New Mexico Judicial Council; the author hereof has served with two prominent Indians on the New Mexico Judicial Standards Commission; and Indians are serving and have served in local and State governments in New Mexico in many capacities.

What effect did the disclaimer in Art. XXI, Sec. 2, *supra*, have on New Mexico's right to exercise governmental power and control over Indian Country? The disclaimer, insofar as here involved, clearly concerns itself with and relates to "* * * all right and title to * * * all lands lying within said boundaries [State of

New Mexico] owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; * * *"

The disclaimer in our Constitution of right and title to Indian lands is a disclaimer of proprietary interest therein and control thereover, and not a disclaimer of governmental control. *Kake Village v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed. 2d 573 (1962); *Paiz v. Hughes*, 76 N.M. 562, 417 P.2d 51 (1966); *Batchelor v. Charley*, 74 N.M. 717, 398 P.2d 49 (1965); *State v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963); *Montoya v. Bolack, supra*; *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (Ct. App. 1969). See also *County of Beltrami v. County of Hennepin*, 264 Minn. 406, 119 N.W.2d 25 (1963); *State v. Danielson*, 149 Mont. 438, 427 P.2d 689 (1967); *Fournier v. Roed*, 161 N.W.2d 458 (N. D. 1968); *McClanahan v. State Tax Commission*, 14 Ariz. App. 452, 484 P.2d 221 (1971). As already stated above, defendants are not seeking to assert corporate or proprietary authority over the lands in question, but rather, governmental authority. Thus, the constitutional disclaimer in Art. XXI, Sec. 2, *supra*, presents no obstacle to the exercise by defendants of the authority they claim.

However, defendants may not exercise their claimed authority over the lands if they would thereby interfere with the self-government of the Tesuque Pueblo or impair a right granted, reserved or preempted by Congress. *Kake Village v. Egan, supra; Warren Trading Post v. Tax Comm'n.*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *State v. Danielson, supra; Paiz v. Hughes, supra; McClanahan v. State Tax Commission, supra; Ghahate v. Bureau of Revenue, supra.* Since defendants seek to impose their claimed authority only over lands leased by the Pueblo for 99 years to plaintiff, and only for the purpose of controlling the platting, planning and subdivision activities of plaintiff, we are unable to see how the exercise by defendants of this authority would interfere with the self-government of the Tesuque Pueblo. Compare *Oklahoma Tax Comm'n. v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949); *Thomas*

v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); *State v. Danielson, supra*; *Paiz v. Hughes, supra*; *Montoya v. Bolack, supra*; *Fournier v. Roed, supra*; *McClanahan v. State Tax Commission, supra*; *United States v. Erie County, N.Y.*, 31 F. Supp. 57 (W.D. N.Y. 1939). There is no evidence in the record which would support a finding that the exercise by defendants of their claimed subdivision, planning and platting authority over the lands would interfere with the self-government of the Pueblo, and no such finding was made by the trial court.

However, in our judgment, the exercise of this authority by defendants would conflict with the subdivision, planning and platting authority over these lands which the United States has preempted or reserved unto itself. By the 1968 amendment to 25 U.S.C. Sec. 415, Congress provided that the lands of the Pueblo of Tesuque might be leased for a term not to exceed 99 years subject to "* * * the approval of the Secretary of the Interior * * * [and] * * * under such terms and regulations as may be prescribed by the Secretary of the Interior. * * *" By the 1970 amendment to 25 U.S.C. Sec. 415, Congress added to this leasing act the following provision:

> "* * * Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject."

Pursuant to the rule-making power vested by Congress in the Secretary, who has promulgated comprehensive rules and regulations which appear in 25 C.F.R., and particularly in pts. 1.4 and 131, it is obvious to us that Congress intended to and has accomplished, by its enactments and the extensive and all-inclusive regulations promulgated pursuant thereto, a preemption by or a reservation in the United States of all control over

the leasing of Indian lands, and this includes the subdivision, planning and platting of these lands for the uses to be made thereof during the term of the leasehold. Under these circumstances there is no room for the State or its political subdivisions to impose additional or conflicting controls relating to the subdivision, planning or platting of the lands. *Warren Trading Post v. Tax Comm'n., supra.* It is for Congress to decide when and to what extent the states and the political subdivisions thereof may exercise subdivision, planning and platting control over Indian lands leased pursuant to 25 U.S.C. Sec. 415, *supra,* and the regulations of the Secretary of the Interior promulgated under the authority granted him by Congress. See *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903).

It follows from what has been said that the judgment of the trial court should be reversed for lack of jurisdiction over defendants and this cause remanded to the trial court for whatever action is required to comply with this decision.

IT IS SO ORDERED.

s/LaFel E. Oman
Justice

WE CONCUR:

s/John B. McManus, Jr. J.

s/Donnan Stephenson J.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Wednesday, November 22, 1972

No. 9441

SANGRE DE CRISTO DEVELOPMENT CORPORATION, INC.,
Plaintiff-Appellee,

vs. Santa Fe County

CITY OF SANTA FE and BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, NEW MEXICO,
Defendants-Appellants.

This cause having heretofore been submitted and taken under advisement, and the Court having heretofore on September 22, 1972, handed down its opinion reversing same, upon reconsideration of said cause announces its decision by Mr. Justice Oman, Mr. Justice McManus and Mr. Justice Stephenson concurring, withdrawing the former opinion and judgment and substituting therefor its opinion of this date reversing the judgment of the District Court for the reasons given in the opinion of the Court on file, and otherwise denying the motions for rehearing.

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the opinion and judgment heretofore entered herein on September 22, 1972, be and the same is hereby withdrawn, and the opinion this day filed is substituted therefor, reversing the judgment of the District Court within and for the County of Santa Fe, whence this cause came into this Court, and the cause is remanded to the said District Court of Santa Fe County for whatever action is required to comply with said opinion and this decision.

APPENDIX B

I. 25 U.S.C. Sec. 415(a):

Sec. 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary.

(a) Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Tulalip Indian Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. *Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to*

the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

Note: The italicized last sentence was added by Public Law 91-275, 84 Stat. 303, approved June 2, 1970.

II. 25 C.F.R. Sec. 1.4:

Sec. 1.4. State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate. [30 F.R. 7520, June 9, 1965]

III. 25 C.F.R. Sec. 131.1 through 131.14

Sec. 131.1 Definitions.

As used in this part:

(a) "Secretary" means the Secretary of the Interior or his authorized representative acting under delegated authority.

(b) "Individually owned land" means land or any interest therein held in trust by the United States for the benefit of individual Indians and land or any interest therein held by individual Indians subject to Federal restrictions against alienation or encumbrance.

(c) "Tribal land" means land or any interest therein held by the United States in trust for a tribe, band, community, group or pueblo of Indians, and land that is held by a tribe, band, community, group or pueblo of Indians subject to Federal restrictions against alienation or encumbrance, and includes such land reserved for Indian Bureau administrative purposes when it is not immediately needed for such purposes. The term also includes lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476). This term also includes assignments of tribal land. Unless the terms of the assignment provide for the leasing of the land by the holder of the assignment, the tribe must join with the assignee in the grant of a lease.

(d) "Government land" means land, other than tribal land, acquired or reserved by the United States for Indian Bureau administrative purposes which are not immediately needed for the purposes for which they were acquired or reserved and land transferred to or placed under the jurisdiction of the Bureau of Indian Affairs.

(e) "Permit" means a privilege revocable at will in the discretion of the Secretary and not assignable, to enter on and use a specified tract of land for a specified purpose. The terms "lease", "lessor", and "lessee", when used in this part include, when applicable, "permit", "permitter", and "permittee", respectively.

Sec. 131.2 Grants of leases by Secretary.

(a) The Secretary may grant leases on individually owned land

on behalf of: (1) Persons who are non compos mentis; (2) orphaned minors; (3) the undetermined heirs of a decedent's estate; (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have given the Secretary written authority to execute leases on their behalf.

(b) The Secretary may grant leases on the individually owned land of an adult Indian whose whereabouts is unknown, on such terms as are necessary to protect and preserve such property.

(c) The Secretary may grant permits on Government land.

Sec. 131.3 Grants of leases by owners or their representatives.

The following may grant leases: (1) Adults, other than those non compos mentis, (2) adults other than those non compos mentis, on behalf of their minor children, and on behalf of minor children to whom they stand in loco parentis when such children do not have a legal representative, (3) the guardian, conservator or other fiduciary, appointed by a state court or by a tribal court operating under an approved constitution or law and order code, of a minor or persons who are non compos mentis or are otherwise under legal disability, (4) tribes or tribal corporations acting through their appropriate officials.

Sec. 131.4 Use of land of minors.

The natural or legal guardian, or other person standing in loco parentis of minor children who have the care and custody of such children may use the individually owned land of such children during the period of minority without charge for the use of the land if such use will enable such person to engage in a business or other enterprise which will be beneficial to such minor children.

Sec. 131.5 Special requirements and provisions.

(a) All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.

(b) Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental.

(1) An adult Indian owner of trust or restricted land may lease his land for religious, educational, recreational or other public purposes to religious organizations or to agencies of the Federal, State or local government at a nominal rental. Such adult Indian may lease land to members of his immediate family with or without rental consideration. For purposes of this section, "immediate family" is defined as the Indian's spouse, brothers, sisters, lineal ancestors, or descendants.

(2) In the discretion of the Secretary, tribal land may be leased at a nominal rental for religious, educational, recreational, or other public purposes to religious organizations or to agencies of Federal, State, or local governments; for purposes of subsidization for the benefit of the tribe; and for homesite purposes to tribal members provided the land is not commercial or industrial in character.

(3) Leases may be granted or approved by the Secretary at less than the fair annual rental when in his judgment such action would be in the best interest of the landowners.

(c) Unless otherwise provided by the Secretary, a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond may be for the purpose of guaranteeing:

(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations.

(d) The lessee may be required to provide insurance in an amount adequate to protect any improvements on the leased premises; the lessee may also be required to furnish appropriate liability insurance, and such other insurance as may be necessary to protect the lessor's interest.

(e) No lease shall provide the lessee a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part. No lease shall be entered into more than 12 months prior to the commencement of the term of the lease. Except with the approval of the Secretary no lease shall provide for payment of rent in advance of the

beginning of the annual use period for which such rent is paid. The lease contract shall contain provisions as to the dates rents shall be come due and payable.

(f) Leases granted or approved under this part shall contain provisions as to whether payment of rentals is to be made direct to the owner of the land or his representative or to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(g) All leases issued under this part shall contain the following provisions:

(1) While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease, and the obligations of his sureties, are to the United States as well as to the owner of the land.

(2) Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified of any such change in the status of the land.

(3) The lessee agrees that he will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

(h) Leases granted or approved under this part on individually owned lands which provide for payment of rental direct to the owner or his representative shall contain the following provisions:

(1) In the event of the death of the owner during the term of this lease and while the leased premises are in trust or restricted status, all rentals remaining due or payable to the decedent or his representative under the provisions of the lease shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

(2) While the leased premises are in trust or restricted status, the Secretary may in his discretion suspend the direct rental payment provisions of this lease, in which event the rentals shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

Sec. 131.6 Negotiation of leases.

(a) Leases of individually owned land or tribal land may be negotiated by those owners or their representatives who may execute leases pursuant to Sec. 131.3.

(b) Where the owners of a majority interest, or their representatives, who may grant leases under Sec. 131.3, have negotiated a lease satisfactory to the Secretary, he may join in the execution of the lease and thereby commit the interests of those persons in whose behalf he is authorized to grant leases under Sec. 131.2 (a) (1), (2), (3), and (5).

(c) Where the Secretary may grant leases under Sec. 131.2, he may negotiate leases when in his judgment the fair annual rental can thus be obtained.

Sec. 131.7 Advertisement.

Except as otherwise provided in this part, prior to granting a lease or permit as authorized under Sec. 131.2, the Secretary shall advertise the land for lease. Advertisements will call for sealed bids and will not offer preference rights.

Sec. 131.8 Duration of leases.

Leases granted or approved under this part shall be limited to the minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return to the owner consistent with prudent management and conservation practices, and except as otherwise provided in this part shall not exceed the number of years provided for in this section. Except for those leases authorized by Sec. 131.5(b) (1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made with the written concurrence of the owners and the approval of the Secretary.

(a) Leases for public, religious, educational, recreational, residential, or business purposes shall not exceed 25 years but may include provisions authorizing a renewal or an extension for one additional term of not to exceed 25 years, except such leases of land on the Hollywood (formerly Dania) Reservation, Fla.; the Navajo Reservation, Ariz., N. Mex., and Utah; the Palm Springs Reservation, Calif.; the Southern Ute Reservation, Colo.; the Fort Mohave Reservation, Calif., Ariz., and Nev.; the Pyramid Lake Reservation, Nev.; the Gila River Reservation, Ariz.; the San Carlos Apache Reservation, Ariz.; the Spokane Reservation, Wash.; the Hualapai Reservation, Ariz.; the Swinomish Reservation, Wash.; the Pueblos of Cochiti, Pojoaque, Tesuque, and Zuni, N. Mex.; and land on the Colorado River Reservation, Ariz.; and Calif., as stated in Sec. 131.18; which leases may be made for terms of not to exceed 99 years.

(b) Leases may be made for 25 years for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops. To determine whether a long term lease is justified, it is necessary to give consideration to the nature of the crop to be grown, including the feasibility of growing the proposed crop. The amount or substantiality of the investment, as well as the necessity of such an investment in order to grow the proposed crop, are also elements to consider in evaluating the term of the proposed lease.

(c) Farming leases not granted for the purpose of growing specialized crops shall not exceed five years for dry-farming land or ten years for irrigable land.

(d) Grazing leases which require substantial development or improvement of the land shall not exceed ten years.

(e) Leases granted by the Secretary pursuant to Sec. 131.2(a)(3) shall be for a term of not to exceed two years except as otherwise provided in Sec. 131.6 (b).

[26 F.R. 10966, Nov. 23, 1961, as amended at 19 F.R. 2542, Feb. 18, 1964; 34 F.R. 3686, Mar. 1, 1969]

Sec. 131.9 Ownership of improvements.

Improvements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom

under the terms of the lease. The lease shall specify the maximum time allowed for removal of any improvements so excepted.

Sec. 131.10 Unitization for leasing.

Where it appears advantageous to the owners and advantageous to the operation of the land, a single lease contract may include more than one parcel of land in separate ownerships, tribal or individual, provided the statutory authorities and other applicable requirements of this part are observed.

Sec. 131.11 Conservation and land use requirement.

Farming and grazing operations conducted under leases granted or approved under this part shall be conducted in accordance with recognized principles of good practice and prudent management. Land use stipulations or conservation plans necessary to define such use shall be incorporated in and made a part of the lease.

Sec. 131.12 Subleases and assignments.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties.

(b) With the consent of the Secretary, the lease may contain a provision authorizing the lessee to sublease the premises, in whole or in part, without further approval. Subleases so made shall not serve to relieve the sublessor from any liability nor diminish any supervisory authority of the Secretary provided for under the approved lease.

(c) With the consent of the Secretary, the lease may contain provisions authorizing the lessee to encumber his leasehold interest in the premises for the purpose of borrowing capital for the development and improvement of the leased premises. The encumbrance instrument, must be approved by the Secretary. If a sale or foreclosure under the approved encumbrance occurs and the encumbrancer is the purchaser, he may assign the leasehold with the approval of the Secretary or the consent of the other parties to the lease, provided, however, that the assignee accepts and agrees in writing to be bound by all the

terms and conditions of the lease. If the purchaser is a party other than the encumbrancer, approval by the Secretary of any assignment will be required, and such purchaser will be bound by the terms of the lease and will assume in writing all the obligations thereunder.

(d) With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities may contain provisions permitting the assignment of the lease without further consent or approval where a lending institution or an agency of the United States makes, insures or guarantees a loan to an individual member of the tribe or to a tribal housing authority for the purpose of providing funds for the construction of housing for Indians on the leased premises; provided, the leasehold has been pledged as security for the loan and the lender has obtained the leasehold by foreclosure or otherwise. Such leases may with the consent of the Secretary also contain provisions permitting the lessee to assign the lease without further consent or approval.

[26 F.R. 10966, Nov. 23, 1961, as amended at 29 F.R. 2542, Feb. 18, 1964]

Sec. 131.13 Payment of fees and drainage and irrigation charges.

(a) Except as provided in Part 221 of this chapter, any lease covering lands within an irrigation project or drainage district shall require the lessee to pay annually on or before the due date, during the term of the lease and in the amounts determined, all charges assessed against such lands. Such charges shall be in addition to the rental payments prescribed in the lease. All payments of such charges and penalties shall be made to the official designated in the lease to receive such payments.

(b) Unless otherwise provided in this part or by the Secretary, fees based upon the annual rental payable under the lease shall be collected on each lease, sublease, assignment, transfer, renewal, extension, modification, or other instrument issued in connection with the leasing or permitting of restricted lands under the regulations in this part.

(1) Except where all or any part of the expenses of the work are paid from tribal funds, in which event an additional or alternate schedule of fees may be established subject to the

approval of the Secretary, the fee to be paid shall be as follows:

Rental	*Percent*
On the first $500	
On the next $4,500	3
On all rental above $5,000	2
	1

In no event shall the fee be less than $2.00 nor exceed $250.

(3) In the case of percentage rental leases, the fee shall be calculated on the basis of the guaranteed minimum rental. Where rental consists of a stated annual cash rental in addition to a percentage rental, the estimated revenue anticipated from the percentage rental shall be mutually agreed upon solely for the purpose of fixing the fee. The fee to be collected in case of crop-share or other special consideration leases or permits shall be based on an estimate of the cash rental value of the lessor's share of the crops. No fees so collected shall be refunded.

Sec. 131.14 Violation of lease.

Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. The surety or sureties shall be sent a copy of each such notice. If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises. The notice of cancellation shall inform the lessee of his right to appeal pursuant to Part 2 of this chapter. Where breach of contract can be satisfied by the payment of damages, the Secretary may approve the damage settlement between the parties to the lease, or where the Secretary has granted the

lease, he may accept the damage settlement. With the consent of the Secretary, leases of tribal land to individual members of the tribe or to tribal housing authorities for the purpose of providing lands on which housing for Indians is to be constructed, may contain a provision prohibiting the cancellation or termination of the lease during the period that a loan, loan insurance, or loan guarantee is in effect without the approval of the lender or the agency of the United States which has made, insured or guaranteed the loan for the construction of housing on the leased premises.
[29 F.R. 2542, Feb. 18, 1964]

IV. Secs. 14-19-1 through 14-19-14, N.M.S.A., 1953 Comp.:

14-19-1. Platting—Definitions.—"Subdivide" or "subdivision" means the division of land into two [2] or more parts by platting or by metes and bounds description into tracts of less than five [5] acres in any one [1] calendar year for the purpose of:

A. Sale for building purposes;
B. Laying out a municipality or any part thereof;
C. Adding to a municipality;
D. Laying out suburban lots; or
E. Resubdivision.

"Plat" means map, chart, survey, plan or replat certified by a licensed or registered surveyor which contains a description of the subdivided land with ties to permanent monuments.

14-19-2. Subdivision—Description.—Every person who desires to subdivide land shall furnish a plat of the proposed subdivision prepared by a registered, licensed surveyor of New Mexico; except that the resubdivision of platted tracts, which are less than [1] acre abd which are contiguous with each other, for the purpose of increasing or reducing the size of such contiguous tracts, but not less than the minimum standard size required by the political subdivision, shall not require the furnishing of a plat of the proposed resubdivision, provided that a certificate of survey setting forth the legal description of tracts resulting from such resubdivision shall be filed with the municipal planning commis-

sion, the county clerk and the county assessor of that county in which the resubdivision is situated, and such filing shall be considered as a rededication of said described lots in all respects. The plat shall refer to permanent monuments and shall accurately describe each lot, number each lot in progression, give its dimensions and the dimensions of all land dedicated for public use or for the use of the owners of lots fronting or adjacent to the land. Description of the lots by number and plat designation are valid in conveyances and for the purposes of taxation.

14-19-3. Contents of Plat–Acknowledgment.–Every plat shall contain a statement that the subdivision of, insert a correct description of the land being subdivided, appearing on the plat is with the free consent and in accordance with the desire of the undersigned owner and proprietor of the land and shall be acknowledged by the owner and proprietor or his authorized agent in the manner required for the acknowledgment of deeds. If the plat is filed by a corporation, the acknowledgment shall be made by its president and secretary.

14-19-4. Streets and alleys.–Streets and alleys in any subdivision adjoining a municipality shall be continuous with and correspond in direction and width to the streets and alleys of the municipality.

14-19-5. County and municipal jurisdiction over subdivision–Concurrent jurisdiction–Acceptance of unapproved streets–Exercise of jurisdiction.–A. For the purpose of approving the subdivision and platting of land:

(1) the jurisdiction of a county includes all territory not within the boundary of a municipality;

(2) the jurisdiction of a municipality having a population of twenty-five-thousand [25,000] or more persons according to the most recent census includes all territory within five [5] miles of the boundary of the municipality and not within the boundary of another municipality; and

(3) the jurisdiction of a municipality having a population of less than twenty-five-thousand [25,000] persons according to the most recent census includes all territory within three [3] miles of the municipal boundary and not within the boundary

of another municipality. Each municipality shall have jurisdiction over the territory within its boundary.

B. If territory, not lying within the boundary of a municipality, is within the platting jurisdiction of more than one [1] municipality, the platting jurisdiction of each municipality shall terminate equidistant from the boundary of each municipality unless one [1] municipality has a population according to the most recent census of less than two thousand five hundred [2,500] persons and another municipality has a population according to the most recent census of more than two thousand five hundred [2,500] persons. Then the platting jurisdiction of the municipality having the greatest population extends to such territory.

C. The county and a municipality shall exercise concurrent jurisdiction over territory within the platting jurisdiction of both the county and the municipality.

D. The governing body of a municipality or the board of county commissioners may not locate, construct or accept any street dedication until the street dedication is first submitted to the planning authority for approval or disapproval. If disapproved by the planning authority, the street dedication may be approved by a two-thirds [2/3] vote of all the members of the governing body of the municipality having jurisdiction or of the board of county commissioners having jurisdiction. A street dedication accepted by the planning authority or by a two-thirds [2/3] vote of all the members of the governing body of the municipality having jurisdiction or of the board of county commissioners having jurisdiction shall have the same status as any other public street.

14-19-6. Subdivision in unincorporated area—Approval of county commission.—Before a plat of any subdivision within the jurisdiction of a county is filed in the office of the county clerk, the plat shall be approved by the board of county commissioners of the county wherein the proposed subdivision lies. The board of county commissioners shall not approve and sign a plat unless the:

A. Proposed streets conform to adjoining streets;

B. Streets are defined by permanent monuments to the satisfaction of the board of county commissioners; and

C. Boundary of the subdivision is defined by permanent monuments.

14-19-7. Subdivision within the platting jurisdiction of a municipality–Approval of the planning authority–Procedure–Filing fee–Notice of hearing.–A. Before a plat of any subdivision within the jurisdiction of a municipality is filed in the office of the county clerk, the plat shall be submitted to the planning authority of the municipality having jurisdiction for approval.

B. The rules and regulations of the planning authority shall state:

(1) the scale and manner in which the plat is to be prepared;

(2) the number of copies of the plat which shall accompany the original plat;

(3) what other information shall accompany the plat; and

(4) the standards and regulations for subdivisions to which the planning authority may require the subdivider to conform.

C. The person submitting the plat shall pay the necessary filing fee to the municipality and the planning authority, after approval and endorsement, shall file the plat with the county clerk. If the plat is not approved, the planning authority shall return the filing fee and the plat to the person submitting the plat.

D. A plat submitted for approval by the planning authority shall contain the name and address of the person to whom a notice of hearing shall be sent. Notice of the time and place of a hearing on a plat shall be sent by mail to the address on the plat not less than five [5] days before the day of the hearing. No plat shall be acted upon without a public hearing unless the requirement that a public hearing be held is waived by the person seeking approval of the plat.

E. The planning authority of a municipality shall approve or disapprove a plat within thirty-five [35] days of the day of final submission of the plat. If the planning authority does not act within thirty-five [35] days, the plat is deemed to be approved and upon demand the planning authority shall issue a certificate approving the plat. The person seeking approval of the plat may

waive this requirement and agree to an extension of this time period. The reason for disapproval of a plat shall be entered upon the recordings of the planning authority.

F. No plat of territory within the planning and platting jurisdiction of a municipality shall be filed and recorded unless it has been approved by:

(1) the planning commission and endorsed by the chairman of the planning commission; or

(2) the governing body and endorsed by the mayor and clerk of the municipality if the governing body has reserved this power in creating the planning commission or if there is no planning commission.

14-19-7.1. Alternate summary procedure.—A. The filing of a survey certified by any licensed or registered surveyor which contains a description of the subdivided land with ties to permanent monuments shall satisfy the requirements of section 14-19-7 New Mexico Statutes Annotated, 1953 Compilation.

B. in lieu of the requirements of section 14-19-7 New Mexico Statutes Annotated, 1953 Compilation the following procedure may be followed:

(1) The planning authority or board of county commissioners shall establish a summary procedure for approving:

(a) subdivisions of not more than two [2] parcels of land; or

(b) resubdivisions, where the combination or recombination of portions of previously platted lots does not increase the total number of lots; or

(c) subdivisions of two [2] or more parcels of land in areas zoned for industrial use.

(2) Any subdivision approved as authorized in this section shall be in substantial conformity with the subdivision regulations of the planning authority or board of county commissioners.

(3) Any administrative officer or planning commission member may be delegated the authority to approve a subdivision by this section.

(4) Approval by this summary procedure shall be endorsed on plat or on the instrument of conveyance in lieu of a plat and such approval shall be conclusive evidence of the approval of the

planning authority or the board of county commissioners. The county clerk shall accept the instrument of conveyance for filing or recording.

14-19-8. Subdivision within platting jurisdiction of a county and municipality—Dual approval.—Any person seeking the approval of a plat of a subdivision within the platting jurisdiction of both a county and municipality shall secure an endorsement of approval from both the board of county commissioners and the planning authority of the municipality before the plat is filed in the office of the county clerk.

14-19-9. Filing in office of county clerk—Duties of county clerk.—When a plat is submitted for filing in the office of the county clerk, the county clerk shall determine if the proposed subdivision is subject to the provisions of sections 14-19-1 through 14-19-14 New Mexico Statutes Annotated, 1953 Compilation, and if the required endorsements are on the plat. No county clerk shall accept for filing any plat which is subject to the provisions of the Municipal Code and has not been approved by the board of county commissioners, or planning authority within whose jurisdiction the proposed subdivision lies. The plat shall contain an affidavit stating that the proposed subdivision does or does not lie within the planning or platting jurisdiction of any municipality.

14-19-10. Dedication for public use.—The endorsement and filing of a plat is a dedication of the land designated on the plat for public use. Such land is public property. Fee vests in the county if the dedicated land lies outside the boundaries of a municipality. Fee vests in the municipality if the deidcated land lies within the boundaries of a municipality.

14-19-11. Vacation or partial vacation of plat—Approval of government having jurisdiction—Duties of county clerk.—A. Any plat filed in the office of the county clerk may be vacated or a portion of the plat may be vacated provided:

(1) the owners of the land in the territory proposed to be vacated sign a statement, duly acknowledged, declaring the plat or a portion of the plat to be vacated; and

(2) the statement is endorsed "Approved" by the board of county commissioners and the planning authority of the municipality within whose platting jurisdiction the subdivision lies.

B. in approving the vacation or partial vacation of a plat, the board of county commissioners or planning authority of the municipality shall consider if the vacation or partial vacation of a plat will adversely affect the interests or rights of persons in contiguous territory or within the subdivision being vacated. In approving the vacation or partial vacation of a plat, the board of county commissioners or planning authority of the municipality may require that the streets dedicated to the county or municipality in the original plat shall continue to be dedicated to the county or municipality. The owners of lots on the vacated plat or on the portion of the plat being vacated may enclose in equal proportions the adjoining streets and alleys which are authorized to be abandoned by the board of county commissioners and planning authority of the municipality.

C. The statement declaring the vacation or partial vacation of a plat and having the proper endorsements shall be filed in the office of the county clerk wherein the original plat is filed. The county clerk shall mark the applicable words "Vacated" or "Partially Vacated" across the plat and shall refer on the plat to the volume and page on which the statement of vacation or partial vacation is recorded.

14-19-12. Vacation—Rights of utility.—The rights of any utility already existing shall not be affected by any vacation or partial vacation of a plat.

14-19-13. Penalties for transferring lots in unapproved subdivisions.—Whoever being the owner, or agent of the owner, of any land located within the platting jurisdiction of the planning commission of any municipality or of the board of county commissioners transfers, or sells, or agrees to sell, or negotiates to sell such land by reference to or exhibition of or by other use of a plat or subdivision of such land before such plat has been approved as herein provided for in this act and recorded in the office of the appropriate county recorder, shall be deemed guilty of a misdemeanor, and upon conviction shall forfeit and pay a penalty of one hundred dollars ($100) for each lot so

transferred or sold, or agreed, or negotiated to be sold; and the description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties. Any such municipality, through its attorney or other official designated by its council, or any such board of county commissioners through the district attorney, may enjoin such transfer or sale or agreement by action for injunction or may recover the penalty by civil action.

14-19-14. Approval necessary for utility protection.—Until a plat has been approved by the planning authority, any official of a municipality or public utility company who shall serve or connect the land within the subdivision and within the planning and platting jurisdiction of a municipality with any public utility such as water, sewer, electric or gas is guilty of a misdemeanor. A municipality may require any utility connected in violation of this section to be disconnected.

V. Secs. 70-3-1 through 70-3-9, N.M.S.A., 1953 Comp. (1971 Supp.):

70-3-1. Short title.—This act [70-3-1 to 70-3-9] may be cited as the "Land Subdivision Act."

70-3-2. Definitions.—As used in the Land Subdivision Act [70-3-1 to 70-3-9]:

A. "Subdivided land" and "subdivision" means improved or unimproved land divided, or proposed to be divided, into twenty-five [25] or more lots or parcels for the purpose of sale or lease, but does not include the leasing of apartments, offices, stores or similar space within a building unless an undivided interest in the land is granted as a condition precedent to occupying space within the building and does not include subdivisions approved by an agency of the United States or by a municipality, and does not include any subdivision where the primary business of the developer is the construction of home improvements;

B. "Blanket encumbrance" means a trust deed, mortgage or

any other lien or encumbrance, including mechanics' liens, securing or evidencing the payment of money or the furnishing of services or materials and affecting land to be subdivided or affecting more than one [1] lot or parcel of subdivided land, or an agreement affecting more than one [1] lot or parcel by which the owner or subdivider holds the subdivision under an option, contract to sell or trust agreement. Taxes and assessments levied by public authority are not included.

70-3-3. Approval of plat by county commission prior to sale.–It shall be unlawful to sell, offer to sell, lease or offer to lease to the public subdivided land as defined hereinabove until a plat of such subdivided land being sold has been approved by the county commission wherein such land is situate; and

Until legal access from an existing public way and to each lot offered for sale or lease has been dedicated and accepted by the appropriate county commission.

70-3-4. Conditions affecting use or occupancy of subdivided land–Terms of contract–Blanket encumbrances–Written disclosure prior to sale.–It shall be unlawful to sell or lease until there has been disclosed in writing to the purchaser or lessee of a lot or parcel in the subdivided land, the following:

A. All restrictions or reservations of record which subject the subdivided land to any unusual conditions affecting its use or occupancy;

B. The fact that any street or road facilities have not been accepted for maintenance by a governmental agency when such is the case;

C. Availability of public utilities in the subdivision including water, electricity, gas and telephone facilities;

D. If water is available only from subterranean sources the depth of such water within the subdivision;

E. The complete price and financing terms or rental; and

F. The existence of blanket encumbrances, if any, on such subdivision, unless such blanket encumbrances provide for a proper release or subordination of said blanket encumbrances to such lot or parcel.

70-3-5. Advertising standards.—Brochures, publications and advertising of any form relating to subdivided land shall:

A. Not misrepresent or contain false or misleading statements of fact;

B. Not describe deeds, title insurance or other items included in a transaction as "free," and shall not state that any lot or parcel is "free" or given as an "award" or "prize" if any consideration is required for any reason;

C. Not describe lots or parcels available for "closing costs only" or similar terms unless all such costs are accurately and completely itemized or when additional lots must be purchased at a higher price;

D. Not include an asterisk or other reference symbol as a means of contradicting or substantially changing any statement;

E. Disclose that individual lots or parcels are not identifiable when such is the case;

F. If illustrations of the subdivision are used, accurately portray the subdivision in its present state, and if illustrations are used portraying points of interest outside the subdivision, state the actual road miles from the subdivision;

G. Not contain artists' conceptions of the subdivision or any facilities within it unless clearly described as such, and shall not contain maps unless accurately drawn to scale and the scale indicated;

H. Not contain references to any facilities, points of interest, or municipalities located outside the subdivision unless the distances from the subdivision are stated in the advertisement in actual road miles.

70-3-6. Fraud—Penalty.—Any officer, agent or employee of any firm or corporation, or any other person who knowingly authorizes or assists in the publication, advertising, distribution or circulation of any false statement or representation concerning any subdivided land offered for sale or lease, and any person, firm or corporation who, with knowledge that any written statement relating to the subdivided land is false or fraudulent, issues, circulates, publishes or distributes it in this state, is guilty of a felony and shall be punished by imprisonment for not more than

five [5] years, or by a fine of not more than one hundred thousand dollars ($100,000), or both.

70-3-7. Other violations–Penalty.–A. It is unlawful to:

(1) Willfully violate or fail to comply with any provisions of the Land Subdivision Act [70-3-1 to 70-3-9]; or

(2) Advertise or publish, or assist in advertising and publishing in this state the sale or lease of any lot or parcel of subdivided land located in another state, territory or foreign country unless the advertisement or publication complies with the requirements of the Land Subdivision Act with respect to subdivisions located in this state.

B. Any person, firm or corporation violating any provision of this section is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred thousand dollars ($100,000).

70-3-8. Injunction.–Whenever the attorney general of the state of New Mexico or any district attorney of a judicial district of the state of New Mexico, after a complaint has been filed by any individual alleging injury hereunder, or upon his own initiative, after investigation made, believes any officer, agent or employee of any firm or corporation or any other person is knowingly violating or authorizing violation of any part of this act [70-3-1 to 70-3-9], he shall bring an action to enjoin the violation in any district court regardless of whether criminal charges are filed.

70-3-9. Application of act.–Each owner, his agent or subdivider, of subdivided land presently being offered for sale or lease shall comply with the provisions of the Land Subdivision Act [70-3-1 to 70-3-9] within six [6] months after the effective date of the act.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1151

CITY OF SANTA FE, a municipal corporation and BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, a political subdivision of the State of New Mexico,

Petitioners,

vs.

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

REASONS FOR DENYING THE WRIT

The Respondent hereby submits that a Writ of Certiorari to review the judgment of the New Mexico Supreme Court entered in this case should not be granted for the four reasons hereinafter stated and explained. The first three of these reasons are responsive to those expressed in the Petition for a Writ of Certiorari. The fourth is in the nature of "new matter."

1. While the New Mexico Supreme Court Has Decided a Federal Question, Its Decision Accords With the Decisions of the United States Supreme Court and of Other Federal Courts on the Basic Question.

Essentially, the question presented to and decided by the New Mexico Supreme Court in *Sangre de Cristo Development Corporation, Inc., v. City of Santa Fe, et al.*, ____ N.M. ____, 503 P.2d 323 (1972), was whether the Petitioners, as political subdivisions of a non-Public Law 280[1] state and pursuant to its laws, had the authority and power to control and regulate a non-Indian lessee's uses of and related activities on the lands of an Indian Pueblo.[2] In deciding that the Petitioners did not have the authority and power claimed by them, the New Mexico court observed (1) that Pueblo Indians are "Indian Tribes" and wards

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1. By Public Law 280, 67 Stat. 588, August 15, 1953 (18 U.S.C. Sec. 1162 and 28 U.S.C. Sec. 1360), Congress conferred comprehensive criminal and civil jurisdiction over Indians within Indian country upon California, Minnesota, Nebraska, Oregon and Wisconsin, and gave its consent to the assumption of such jurisdiction by other states if they appropriately amended their constitutions. New Mexico has not done so. See *Montoya v. Bolack*, 70 N.M. 196, 204, 372 P.2d 387 (1962) and *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 332, 361 P.2d 950 (1961). By Public Law 90-284, Title IV, 82 Stat. 78, Congress repealed the former provision permitting states to unilaterally assume jurisdiction over Indians and Indian country and enacted a virtually identical law permitting such assumption of jurisdiction by amendment of the state's constitution andt he consent of a majority of the enrolled adult members of the tribe affected. See 25 U.S.C. Secs. 1321-1326.
2. The Lease (App. A., *infra*), dated April 17, 1970, was made between the Pueblo of Tesuque (an Indian tribe recognized by the United States Department of Interior), as lessor, and the Respondent, as lessee, pursuant to 25 U.S.C. Sec. 415, which then provided, in material part, that:

> Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for . . . recreational residential, or business purposes, . . . All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on . . . the pueblo of Tesuque, . . . which may be for a term of not to exceed ninety-nine years, . . . (A)ll leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior . . .

of the United States government (503 P.2d 329), (2) that their lands are "Indian country" (*ibid.*), (3) that, accordingly, "the United States, through Congress, if it so elected, could exert total governmental control over Indian country" (*ibid.*), (4) that the New Mexico constitutional disclaimer clause[3] "does not preclude the applicability to the lands of valid state laws requiring platting and planning approval by" the Petitioners (*ibid.*) because the clause "is a disclaimer of proprietary interest therein and control thereover, and not a disclaimer of governmental control" (503 P.2d 330), (5) that the court was "unable to see how the exercise by defendants of this authority would interfere with the self-government of the Tesuque Pueblo" (503 P.2d 330-31), (6) but, that (503 P.2d 331):

> However, in our judgment, the exercise of this authority by defendants would conflict with the subdivision, planning and platting authority over these lands which the United States has preempted or reserved unto itself. . . .
>
> . . . . . .
>
> . . . Under these circumstances[4] there is no room for the

3. In response to the New Mexico Enabling Act (Act of June 20, 1910, 36 Stat. 557) Article XXI of the state's constitution provides, in material part, that:

> Sec. 2. The people inhabiting this state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian Tribe shall have been extinguished, the same shall be and remain subject to the disposition and absolute jurisdiction and control of Congress of the United States; . . .
>
> . . . . . .
>
> Sec. 8. . . . (A)nd the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands owned or occupied by them on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state.

4. The "circumstances" expressly referred to by the New Mexico court were the language of 25 U.S.C Sec. 415, as amended by Public Law 91-275, 84 Stat. 303, June 2, 1970, relating to the leasing of Indian country land, and certain regulations of the Secretary of the Interior.

> State or its political subdivisions to impose additional or conflicting controls relating to the subdivision, planning or platting of the lands. *Warren Trading Post v. Tax Comm'n., supra.*[5] It is for Congress to decide when and to what extent the states and the political subdivisions thereof may exercise subdivision, planning and platting control over Indian lands leased pursuant to 25 U.S.C. Sec. 415, *supra,* and the regulations of the Secretary of the Interior promulgated under the authority granted him by Congress. See *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). (Footnotes added.)

Manifestly, the New Mexico Supreme Court has decided a federal question, and, in so doing, it has applied its interpretation of the case authorities decided by the United States Supreme Court (this Court).

As a first reason for granting certiorari, the Petitioners claim that the federal question has not heretofore been decided by this Court. This curious assertion assumes that a federal question decision of this Court regarding the authority and power of a state to enforce its laws within Indian country is strictly limited to the particular type of state law in question – that is to say, since the Court has not heretofore considered the precise issue of whether state subdivision, planning, platting or zoning laws can be enforced within Indian country as against a non-Indian lessee, the federal question involved has not been decided by this Court.[6] This assertion, we submit, ascribes an unintended and unnecessary narrowness to the expression "federal question" used in the Court's Rule 19(a).

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5. 380 U.S. 685 (1965).
6. This Court denied certiorari in *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22 (1967), cert. den. 389 U.S. 1016 (1967), where it was held by the Supreme Court of Washington, a Public Law 280 state (*supra,* Note 1), that a county could not ban a non-Indian's use of leased Indian lands as a garbage dump by the enforcement of its zoning ordinances.

Frankly, the Respondent is by no means satisfied with the rationale of the New Mexico court in the instant matter – that is to say, with its aforementioned observations as to the meaning and consequences of New Mexico's constitutional disclaimer clause and as to Petitioners' interference with internal Indian tribal sovereignty. But however that may be, the fact is that both the rationale and the decision of the New Mexico court in this matter are supported by federal question decisions of this Court as follows:

This Court has decided that the Indian Pueblos of New Mexico and their lands are "Indian tribes" and "Indian country," respectively, in the historical-legal sense of these expressions; that Congress had the power to so declare and did so. *United States v. Sandoval,* 231 U.S. 28 (1913); *United States v. Candelaria,* 271 U.S. 432 (1926); *United States v. Chavez,* 290 U.S. 357 (1933).

This Court has decided that the supreme authority and power reposes in Congress to control and regulate Indian tribes within Indian country, as well as commerce with such tribes, activities within and uses of such country, and to preempt any or all internal sovereign powers of such tribes and to delegate the same to federal officials or to the states. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama,* 118 U.S. 375 (1886). Further, it has been observed by this Court that, when Congress had wished the states to exercise criminal or civil jurisdiction within Indian country, it has expressly granted to the states the jurisdiction which *Worcester v. Georgia, supra,* denies to them. *Williams v. Lee,* 358 U.S. 217 (1959).

It has been held by this Court, that except as the same may have been limited, modified or preempted by Congress, an Indian tribe has sovereign power *within its Indian country* as to all matters affecting tribal government, affairs and property, including the authority and power to permit non-Indians to come upon and to transact business with the tribe respecting such property and the authority and power to control and regulate the use of such property and the conditions of such business by

Indians and non-Indians alike. *Worcester v. Georgia, supra; Morris v. Hitchcock,* 194 U.S. 384 (1904).[7]

It has been held by this Court that the laws of a state can have no force *within Indian country, Worcester v. Georgia, supra,* with the following exceptions: State criminal laws respecting crimes committed within Indian country by non-Indians not involving Indians or Indian property, *United States v. McBratney,* 104 U.S. 621 (1881), *Draper v. United States,* 164 U.S. 240 (1896), *New York ex rel Ray v. Martin,* 326 U.S. 496 (1946); state or territorial laws permitting the service of process upon non-Indians within Indian country in causes between non-Indians, *Langford v. Monteith,* 102 U.S. 145 (1880); territorial laws taxing the personal property of a non-Indian within Indian country, *Thomas v. Gay,* 169 U.S. 264 (1898).

Only in the instance where the assertion of state authority and power will not interfere with or infringe upon tribal sovereignty within Indian country has this Court indicated a willingness to permit such an assertion. *Williams v. Lee, supra.* But as indicated in this decision, an attempt by the state to control and regulate that which falls within the province of tribal sovereignty within its Indian country will not be tolerated. Moreover, as this Court has recently held, a tribal council cannot even bestow or confer an element of its tribal sovereignty within Indian country upon a state except in the manner expressly provided by Congress. *Kennerly v. Dist. Ct. of Ninth J.D. of Montana,* 400 U.S. 423 (1971). And even where the assertion of state regulatory or taxing authority and power does not necessarily interfere with or infringe upon tribal sovereignty within Indian country, this Court has held that the assertion will not be permitted where Congress has taken the matter in hand and has delegated a comprehensive power to control and regulate the activities in question to a federal official. *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965).

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7. See also *Buster v. Wright,* 135 F. 947 (8th Cir. 1905); *James H. Hamilton v. United States,* 42 Ct. Cl. 282 (1907); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

Mindful of the foregoing, the Petitioners chiefly rely here, as they did below, upon the comments and observations of this Court in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), to suggest that new and expanded parameters of permissible state control and regulation within Indian country are to be observed and applied. The decision is not the philosopher's stone the Petitioners require; it neither adds to nor subtracts from the foregoing principles. In *Kake*, the question was simply this: Can a Public Law 280 state[8] whose Enabling Act specifies that Indian lands and fishing rights "shall be and remain under the absolute jurisdiction and control of the United States . . . , except to such extent as the Congress has prescribed or may hereafter prescribe,"[9] prevent an Indian tribe, which has no "Indian country" but does have an off-reservation, aboriginal right to fish in certain state waters, from exercising such right by using fishtraps in violation of state law? The answer had to be "yes" under any doctrine. First, because off-reservation hunting and fishing rights have not been regarded as immune from state regulation during this century, *Ward v. Race Horse*, 163 U.S. 504 (1896); tribal sovereignty does not extend outside of Indian country. Second, because an aboriginal, as distinguished from a federally granted, right was not given immunity from Alaskan law under the congressional act conferring Indian criminal and civil jurisdiction on the state. Third, because no additional immunity was conferred or preserved by the "absolute jurisdiction and control of the United States" clause of the Alaska Enabling Act and Constitution since Congress had already otherwise "prescribed" by conferring criminal and civil jurisdiction over its Indians upon Alaska.

In view of the foregoing, it is respectfully submitted that this Court has heretofore decided the broad federal questions involved in the proceeding before the New Mexico court and that, if the latter court misinterpreted this Court's decisions (as we think it did in several instances), it erred in favor of the Petitioners.

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8. Public Law 85-615, 72 Stat. 545, August 8, 1958. See also Note 1, *supra*.
9. Alaska Enabling Act, Sec. 4, 72 Stat. 339, July 7, 1958.

2. The New Mexico Court Did Not Decide the Federal Question in a Manner Inconsistent With the Applicable Decisions of the United States Supreme Court.

As their second ground for granting the writ, the Petitioners complain that the New Mexico court erroneously applied the federal preemption doctrine explained by this Court in *Warren Trading Post Co. v. Arizona State Tax Commission, supra.* Specifically, they claim that the federal statutes and regulations cited and discussed by the New Mexico court are not sufficiently comprehensive to invoke the doctrine. The Petitioners' contention must fail for three reasons: First, because the decision of the New Mexico court, as distinguished from the assigned rationale, is supported by more fundamental doctrines announced by this Court, as demonstrated under the preceding point. Second, because the New Mexico court cited and discussed in its decision less than all federal acts giving rise to the preemption. Third, because a subsequent judicial decision demonstrates beyond question that Congress has taken the business of Indian land development by non-Indian lessees so fully in hand that little room remains for the non-Indian developer and that none remains for state or local subdivision, planning, platting, or zoning control. It is unnecessary to repeat what was earlier said in support of the first of these reasons.

As to the second reason, the New Mexico court was informed by the Respondent's brief, as this Court itself observed in *United States v. Candelaria, supra,* that Congress has enacted many laws respecting the disposition of Indian tribal lands. By its Act of June 30, 1834,[10] Congress declared that:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[11]

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10. 4 Stat. 729, 730, c. 161, Sec. 12; 25 U.S.C. Sec. 177.
11. In 1871, Congress abolished the practice of making treaties with Indian tribes. 16 Stat. 544, 566, c. 120, March 3, 1871; 25 U.S.C. Sec. 71.

The Act of February 27, 1851[12] extended the provisions of the 1834 Act to the "Indian tribes" of New Mexico, and the Enabling Act for the state[13] specified that its constitution should declare, as it does,[14] that:

> Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribe shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; . . .

By the Pueblo Land Act of June 7, 1924,[15] Congress specified that:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the state of New Mexico, or in any other manner excepting as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the state of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

And by its Act of June 18, 1934,[16] Congress added to the restrictions imposed by the 1924 Pueblo Lands Act upon the alienation of Pueblo lands by banning all transfers except in exchange for lands of equal value.

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12. 9 Stat. 574, 587, c. 14, Sec. 7.
13. 36 Stat. 557, 558-60, c. 310, Sec. 2, June 20, 1910.
14. New Mexico Constitution, Art. XXI, Sec. 2.
15. 43 Stat. 636, 641-42, c. 331, Sec. 17, June 7, 1924.
16. 48 Stat. 984, 985, c. 576, Sec. 4, June 18, 1934; 25 U.S.C. Sec. 464.

Leases of the lands in question, "with the approval of the Secretary of the Interior, for . . . recreational, residential, or business purposes . . . for a term not to exceed twenty-five years" and "under such *terms* and regulations as may be prescribed by the Secretary of the Interior" were first authorized by the Act of August 9, 1955.[17] The term was extended to 99 years as to the Pueblo of Tesuque by the Act of October 12, 1968.[18]

Turning to the lease in question and to the "*terms*" inserted therein by the Pueblo of Tesuque and the Secretary of the Interior, it may be observed that the Respondent is required to construct and provide a golf course, roads, and all necessary utilities to serve the proposed residential community,[19] to submit a complete master plan and architect's designs of the development for the approval of the Pueblo and the Secretary,[20] to submit all plans for improvements and construction on the land to architect and engineering review boards, the membership of which is to be approved by the Secretary, for prior review and approval,[21] and to comply with all applicable air and water pollution control and prevention laws, regulations and federal agency recommendations.[22] Finally, it should also be noted that Respondent's obligations under the lease are owed to both the Pueblo and the United States.[23]

The foregoing, we submit, constitutes a sufficiently comprehensive scheme of federal regulation as to leave no room for state or local subdivision, planning, platting, or zoning regulation under the doctrines announced by this Court in *Warren Trading Post Co. v. Arizona State Tax Commission, supra.* Moreover, it is also noted that in *Metlakatla Indian Community, Annette Islands Reserve v. Egan,* 369 U.S. 45 (1962), this Court held

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17. Public Law 255, 69 Stat. 539, c. 615, Sec. 1, August 9, 1965; 25 U.S.C. Sec. 415.
18. Public Law 90-570, 82 Stat. 1003, October 12, 1968; 25 U.S.C. Sec. 415.
19. Lease, Art. 7; App. A, p. 6a, *infra.*
20. *Id.*, Art. 8; App. A, p. 6a-7a, *infra.*
21. *Id.*, Art. 9; App. A, p. 9a, *infra.*
22. *Id.*, Art. 37; App. A, p. 9a-10a, *infra.*
23. *Id.*, Art. 28, App. A, p. 9a, *infra.*

that Alaska, upon which Congress had bestowed complete criminal and civil jurisdiction over Indians and their lands,[24] could not enforce its anti-fishtrap conservation laws within a reservation that Congress had declared was "to be held and used by (the Indians) in common, under such rules and regulations and subject to such restrictions as may be prescribed from time to time by the Secretary of the Interior,"[25] if the Secretary decided, by appropriate regulation, to permit the Indians to use fishtraps.

The decision, subsequent to that of the New Mexico court, which indicates that no room remains for state or local subdivision, planning, platting, or zoning control or regulation of the Respondent's activities on the Tesuque Pueblo lands is that of the Court of Appeals for the Tenth Circuit in *Davis v. Morton,* 469 F.2d 593 (10th Cir., Nov. 24, 1972), a decision which may live to rival the massacre at Wounded Knee in the annals of Indian defeats at the hands of their white neighbors. Referring to the lease here in question and to the exercise of the approval power by the Secretary of the Interior, the court held in *Davis* that he was constrained to first embrace the environmental universe by complying with the provisions of the National Environmental Policy Act.[26] Accordingly, since his May 24, 1970 approval of the lease was held to be ineffective, he will also be obliged to comply with the June 2, 1970 amendment to 25 U.S.C. Sec. 415(a)[27] which further specifies that:

> Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial

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24. Public Law 85-615, 72 Stat. 545, August 8,1958; see also Note 1, *supra.*
25. 26 Stat. 1095, 1101, c. 561, Sec. 15, 1891; 48 U.S.C. Sec. 358.
26. 42 U.S.C. Sec. 4321, *et seq.*
27. Public Law 91-275, 84 Stat. 303, June 2, 1970; 25 U.S.C. Sec. 415(a).

forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

3. The Decision of the New Mexico Supreme Court Does Not Conflict With That of the Ninth Circuit and the Decisions of the Arizona Court of Appeals Are Not in Point.

The Petitioners' claim that the decision of the New Mexico court conflicts with that in *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir., 1971), cert. den., 405 U.S. 933 (1972). The dispute in *Agua Caliente* arose in California, a Public Law 280 state, unlike New Mexico.[28] Moreover, by its Act of October 5, 1949,[29] Congress had earlier provided that:

> . . . (A)ll lands located in the Agua Caliente Indian reservation in the state of California, and the Indian residents thereof, shall be subject to the laws, civil and criminal, of the state of California, but nothing contained in this section shall be construed to authorize the alienation, encumbrance, or taxation of the lands of the reservation . . .

The court simply held in *Agua Caliente* that California's possessory interest tax could be imposed under these circumstances upon a non-Indian lessee's interest in *alloted* trust lands of these Indians, but not upon the Indians' interest therein, which seems entirely correct in light of the clear negative implications of the above-quoted statute and in light of the fact that Congress had preempted virtually all internal tribal sovereignty within Indian country and bestowed it upon the state. Moreover, the decision scarcely conflicts with that of the New Mexico court in the instant matter; it is not even in point.

No more in point are the state income tax cases, cited by the Petitioners, in *McClanahan v. State Tax Comm'n.*, 14 Ariz. App.

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28. *Supra*, Note 1.
29. Public Law 322, 63 Stat. 705, c. 604, October 5, 1949.

452, 484 P.2d 221 (1971), and *Kahn v. State Tax Comm'n.*, 16 Ariz. App. 17, 490 P.2d 846 (1972), which are now pending on appeal before this Court. They do appear to conflict, however, with the February 9, 1973, as yet unreported decision of the New Mexico Court of Appeals in *Hunt v. O'Chesky.*[30] Moreover, we note that Arizona did not fare too well in *Williams v. Lee, supra,* and in *Warren Trading Post Co. v. Arizona State Tax Commission, supra,* and we trust that its new attempts to extend its jurisdiction, absent compliance with the requirements of 25 U.S.C. Sec. 1324, *et seq.*,[31] will fare no better.[32]

4. The Pending Case of "*David L. Norvell, Attorney General, State of New Mexico v. Sangre de Cristo Development Company, Inc. and Rogers C. B. Morton, et al.*," D.C.N.M., No. 9106 – Civil, Will Provide a Better Decision for this Court to Review on Appeal or Certiorari.

In the last cited case, the New Mexico Attorney General is seeking a judgment against the Respondent, the Secretary of the Interior, and others, declaring that the New Mexico Land Subdivision Act,[33] the state's Construction Industries Licensing Act,[34] the state's Water Quality Act,[35] the state's laws respecting the regulation of plumbing, drainage, water supplies, sewage and water disposal, lighting, heating, ventilation and sanitation systems in public buildings,[36] the state's ad valorem property tax laws,[37] the state's alcoholic beverage laws,[38] and all regulations promulgated on the authority thereof, are applicable to

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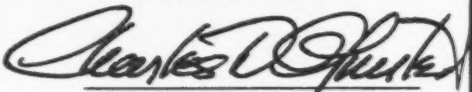
30. Reported in Vol. II, No. 42, New Mexico State Bar Bulletin at 557.
31. Public Law 90-284, Title IV, Secs. 404 and 406, 82 Stat. 78, April 11, 1968; 25 U.S.C. Secs. 1324 and 1326; see Note 1, *supra.*
32. See *Warren Trading Post Co. v. Arizona State Tax Comm'n., supra.* (380 U.S. 691, footnote 18 to opinion.
33. Secs. 70-3-1, *et seq.*, N.M.S.A., 1953.
34. Secs. 67-35-1,*et seq.*, N.M.S.A., 1953.
35. Secs. 75-39-1, *et seq.*, N.M.S.A., 1953.
36. Sec. 12-1-4(8), N.M.S.A., 1953.
37. Secs. 72-1-1, *et seq.*, N.M.S.A., 1953.
38. Secs. 46-6-1, *et seq.*, N.M.S.A., 1953.

the uses of these leased lands, use and business activities thereon, and interests therein and in improvements thereon, by and of Respondent and its sublessees. Some Indian tribes and pueblos have been permitted to intervene and others have been permitted to act as *amicus curiae*. Moreover, the Petitioner County has intervened and the Petitioner City has or will file a brief as *amicus*. The judgment of the District Court will inevitably be reviewed by this Court, however the case is decided. Obviously, it presents a much more comprehensive and fruitful opportunity for review than does the decision of the New Mexico court in the instant matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

OLMSTED & COHEN



Attorneys for Respondent
Sangre de Cristo Development
Company, Inc.

APPENDIX A

LESSEE: SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.

LESSOR: THE PUEBLO OF TESUQUE

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* * * * * * *

LEASE

THIS LEASE, made and entered into this 17th day of April, 1970, by and between THE PUEBLO OF TESUQUE, an Indian Tribe recognized by the United States Department of the Interior and having accepted provisions of the Indian Reorganization Act of June 18, 1934 (18 Stat. 984, *et seq.*) hereinafter called the Lessor, whose address is Tesuque, New Mexico, and SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico corporation, hereinafter called the Lessee, whose principal office is at 342 East Manhattan Avenue, Santa Fe, New Mexico, under the provisions of the Act of August 9, 1955 (69 Stat. 539), as amended by the Act of October 12, 1968 (82 Stat. 1003; 25 U.S.C. 415-415d).

1. DEFINITIONS:

A. "Secretary" means the Secretary of the Interior or his authorized representative, delegate or successor.

B. For the purpose of computing rent due to the Lessor, "Lessee" means, unless otherwise provided herein, the Lessee, sublessees, assignees, transferees, concessionaires, permittees, or any successor in interest of any of them, provided, however, that no duplication is intended.

2. PURPOSE:

A. The premises leased and to be leased hereunder shall be developed, used and operated pursuant to a general plan of development attached hereto as Exhibit "A".

B. Lessee shall not use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

3. LAND DESCRIPTION AND OPTIONS:

For and in consideration of the rent, covenants, terms, conditions and agreements contained in this lease, the Lessor does hereby lease unto the Lessee that certain tract of land located within the Pueblo of Tesuque Grant, Santa Fe County, New Mexico, designated as TRACT 1 on the plat attached hereto as Exhibit "B", excepting therefrom the following:

A plot of land lying in Sec. 10, T. 18 N., R. 9 E., N.M.P.M., within the Tesuque Pueblo Grant, more particularly described as follows: Beginning at an iron highway right of way marker, marked Sta. 4+50, said marker being on the east right of way line of Hwy. No. 85; thence N. 29° 33' W. 411.80 ft. along said right of way line to point 1; thence N. 60° 27' E. 156.50 ft. to point 2; thence N. 34° 55' W. 217.00 ft. to point 3; thence S. 55° 37' W. 136.50 ft. to point 4; thence S. 29° 33' E. 205.00 ft. to point 1, containing 0.70 acre, more or less.

The land now under lease as set forth and described in Exhibit "C" attached hereto is not included nor made a part of this lease.

Provided, however, after the present contractual rights of the Lessees, as shown on Exhibit C, terminate, all of the lands covered by said leases shall become a part of the respective tract (No. 1 or 2) within which they are located, provided the Lessee shall pay to the Lessor an amount equal to the Lessor's present annual rental now being received on such lands or the amounts set forth in this lease on the increments to which these lands become a part, whichever amount is greater.

Except as otherwise specifically provided in this lease, the Lessee shall have, subject to all the covenants, terms, conditions, and agreements contained in this lease, the exclusive right to exercise successive options to include in this lease those further tracts of land located within the Pueblo of Tesuque Grant, Santa Fe County, New Mexico, designated as TRACTS 2 through 5, inclusive, on the said Exhibit "B", except land now under lease as set forth and described in Exhibit "C" attached hereto.

TRACTS 1 through 5, inclusive, are located within the following described lands:

Sections 1, 2, 3, 10, 11, 12, 13, 14, 23 and 24, Township 18 North, Range 9 East, N.M.P.M.;

Sections 33, 34, 35 and 36, Township 19 North, Range 9 East, N.M.P.M.,

and more particularly described in Exhibit "B".

Said TRACTS 1 through 5 are subject to valid existing rights; subject also to the lessor's right hereby reserved, to cross said premises for access to adjoining lands provided such is not inconsistent with the Lessee's use of the leased premises.

It is understood and agreed that the Lessee shall have the right to enter upon all of the foregoing sections of land to survey and plat the exact legal description designated for each numbered tract. The legal description of each numbered tract, and survey platted, shall substantially conform to the plat as shown on Exhibit "B". The filing of a surveyed plat for each tract substantially conforming to Exhibit "B", shall cause this lease to be amended to describe such tract as set forth in the surveyed plat.

It is further understood and agreed that the Lessee may exercise only one such option at a time, in ascending numeral order of numbered tracts. The option to include in this lease Tract 2 must be exercised not later than the earliest of either the start of the eighth lease year hereunder or the end of five years after the Lessee gives notice of waiver to terminate lease, provided for in paragraph 4. Thereafter, each successive option must be exercised not later than five (5) years from and after the exercise of the next preceding option. Failure to exercise any option within the specified time period shall terminate the right to exercise that option and the option to any succeeding tracts.

The total acreage included within Tracts 1 through 5, inclusive, shall not exceed 5,400 acres, more or less.

The option to include in this lease Tracts 2 through 5 shall be exercised by giving written notice thereof to the Lessor and the Secretary; provided, however, that in order for any option to be effective, the Lessee shall have progressed substantially in the development and subleasing of the previously leased tract(s); and shall be current in all rental payments then due and shall not otherwise be in any material and adverse violation of any covenant, term, condition, or agreement of this lease.

4. TERMS

This lease shall be for a term of 99 years, beginning on the date of approval by the Secretary.

Notwithstanding any other provision of this lease, the Lessee may, within two (2) years from the beginning date of this lease, on thirty (30) days' written notice, terminate this lease; such termination to be without penalty, provided, however, that no portion of Tract 1 may be subleased until such time as Lessee waives its right to terminate this lease.

In the event Lessee elects to terminate this lease under provisions of this paragraph, all improvements made on the leasehold shall become the property of Lessor without encumbrance and free and clear of all claims against the same, and the Lessee, on such termination, shall, in addition, make available to Lessor all plans, designs, studies and reports then in possession of Lessee relating to the development of any of the leased premises.

(Articles 5 and 6 omitted)

7. IMPROVEMENTS ON TRACT 1:

Within two (2) years from the beginning date of the term of this lease, Lessee, its successors or assigns, shall begin and diligently pursue construction of a nine (9) hole golf course and roads and utilities to serve the residential community as shown on the Master Plan.

8. PLANS AND DESIGNS:

A. Within six (6) months after the beginning date of the term of this lease, the Lessee shall submit for the approval of the Lessor and the Secretary a Master Plan and architect's design for the complete development of Tract 1. Within six (6) months after the Lessee exercises its option to lease any of the additional tracts provided for in paragraph 3 above, the Lessee shall submit for the approval of the Lessor and the Secretary, a

Master Plan and architect's design for the complete development of such tract. Each master plan and architect's design, upon approval, shall be deemed to take the place of the general plan of development with respect to the land covered thereby. The Secretary and Lessor shall approve or state their reason for disapproval of the Master Plans and architect's designs within sixty (60) days after receipt thereof from Lessee.

All subdivision plats shall substantially conform to the general plan of development referred to in paragraph 2 above.

B. In the event the Lessor, Lessee and the Secretary cannot agree on the master plan and architect's design within a reasonable time after submission thereof by the Lessee, either party may submit to arbitration as provided in paragraph 22, the question whether the proposed master plan and/or the question whether the architect's design are reasonable for the development of the land. The parties shall consider the recommendation of the Board of Arbitration in the approval of the master plan and a reasonable time shall be allowed for such consideration.

C. Before commencing the construction of any improvements at a cost of more than $5,000.00 on the lease premises, the Lessee shall submit to the Lessor and the Secretary comprehensive plans and specifications for the improvements then proposed. The Lessor and the Secretary shall approve such plans and specifications if they conform to the approved master plan and architect's design, but the Lessor and the Secretary shall not thereby assume any responsibility for construction or any violation of any applicable laws, ordinances, or governmental regulations. The Lessor and Secretary shall either approve or disapprove said plans and specifications within sixty (60) days after receipt thereof; provided, that, in any event, approval shall not be unreasonably delayed. If either the Secretary or Lessor shall fail to disapprove within said sixty (60) days period, then such plans and specifications shall, on the expiration of sixty (60) days, be deemed approved by the Secretary or the Lessor, as the case may be. No material changes will be made in plans or specifications after approval without the consent of the Lessor and the

Secretary. In the case of residential improvements, if the plans and specifications for any single family unit or multi-family building are approved in the manner set forth above, such plans and specifications shall be deemed to have been approved where they are applied without change to any other such unit or building on the leased premises.

D. It is understood and agreed by the parties that the Lessee will create or cause to be created a new municipality or municipalities or like political subdivisions or cause to be created property owner's associations or like entities for residents of the leased premises. Such municipalities, political subdivisions or associations must, of necessity, provide any and all municipal services normally and usually provided by municipal corporations. These services shall include, but shall not necessarily be limited to water service, streets, utilities, schools, parks, police and fire protection, and any and all other normal and usual municipal services. As between Lessor and Lessee, it shall be the responsibility of the Lessee to furnish or cause to be furnished all such municipal services, it being understood that neither the Lessor nor the Secretary shall be in any way responsible for or obligated to furnish municipal services to the residents of the leased premises. The Lessee shall submit to the Lessor and Secretary for approval as part of the master plan and architect's designs required by this paragraph, a complete and detailed plan for such municipal services, which plan, upon being approved by the Lessor and the Secretary, shall become an integral part of this lease.

E. Without diminishing the obligation of the Lessee to make improvements as here stated, it is agreed that Lessee may lend money to, or advance money for, an Improvement and/or Maintenance Fund or other similar fund or entity to be used for making such improvements for municipal services which Lessee is obligated to make or which it may deem desirable; the Lessee shall have the right to repayment of any such loan or advance in accordance with the terms of the agreement evidencing the loan or advance; but the Lessor shall never be under obligation to make any such repayment.

9. CONSTRUCTION, MAINTENANCE, REPAIRS AND ALTERATIONS:

Lessee shall appoint an Architect's Review Board and Engineering Review Board; each such Board shall be composed of three (3) members of the particular profession. The members of each Board shall be approved by the Secretary. The Secretary shall not unreasonably withhold his approval of the members appointed by Lessee.

The construction of all improvements by the Lessee shall be in accordance with the plans and specifications provided for in paragraph 8. Construction shall be located in accordance with the master plan and architect's design provided for in paragraph 8. All plans for improvements and construction on the leased premises shall be reviewed and approved by the appropriate Review Board.

The Lessee and the sublessees shall be responsible for the maintenance, repair and upkeep of all buildings and other improvements constructed on the leased premises. The Lessee and its sublessees may make such alterations, additions and improvements as are consistent with provisions of paragraph 8.

(Articles 10 through 27 omitted)

28. OBLIGATIONS OF LESSEE:

While the leased premises are in trust or restricted status, all of the Lessee's obligations under this lease, and the obligations of its sureties, are to the United States as well as to the Lessor.

(Articles 29 through 36 omitted)

37. AIR AND WATER POLLUTION CONTROL:

The Lessee agrees to comply with all applicable air and water pollution control and prevention laws, regulations and Federal

air pollution and water pollution control agencies' recommendations, in the construction, operation and maintenance of all sewage systems, sewage treatment or disposal plants or systems, and all other facilities located on the leased premises.

(Articles 38 through 42 omitted)

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

PUEBLO OF TESUQUE

ATTEST
s/ Geranimo Vigil

By
s/ Joe M. Romero
Governor

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.

ATTEST
s/ Norman R. Rosen
NORMAN R. ROSEN, Secretary

By s/ Santiago E. Campos
SANTIAGO E. CAMPOS, President

Approved as to form
s/ T. Ortega
Field Soliciter

APPROVED: May 24, 1970
s/ Walter O. Olson
Area Director, Albuquerque Area Office (BIA)

Approved pursuant to delegation of approval authority from Commissioner of Indian Affairs by teletype dated May 20, 1970

STATE OF NEW MEXICO)
COUNTY OF SANTA FE) ss.

The foregoing instrument was acknowledged before me this 17th day of April, 1970, by Joe M. Romero, Governor of the Pueblo of Tesuque, an Indian Tribe, on behalf of said Tribe.

s/ Gloria D. Lerma
Notary Public

My Commission Expires: 6-20-72

STATE OF NEW MEXICO)
COUNTY OF SANTA FE)

The foregoing instrument was acknowledged before me this 17th day of April, 1970, by Santiago E. Campos, President of Sangre de Cristo Development Company, Inc., a New Mexico corporation, on behalf of said corporation.

s/ Gloria D. Lerma
Notary Public

My Commission Expires: 6-20-72

No. 72-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

CITY OF SANTA FE, a municipal corporation
BOARD OF COUNTY COMMISSIONERS
SANTA FE COUNTY, a political subdivision
the State of New Mexico,

Petitioners,

vs.

SANGRE DE CRISTO DEVELOPMENT
COMPANY, INC., a New Mexico corporation,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

HARRY S. CONNELLY, JR.
Special Assistant City Attorney
Post Office Box 1904
Santa Fe, New Mexico 87501
Attorney for Petitioner
City of Santa Fe

JAMES B. ALLEY, JR.
Special Assistant District Attorney
Post Office Box 1932
Santa Fe, New Mexico 87501
Attorney for Petitioner
Board of County Commissioners

VERGARA PRINTING CO. — SANTA FE, NEW MEXICO

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72–1151

CITY OF SANTA FE, a municipal corporation and BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, a political subdivision of the State of New Mexico,

Petitioners,

vs.

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., a New Mexico corporation,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATEMENT

The Petition in this case was filed with this Court on February 20, 1973. Respondent filed its Brief in Opposition on or about March 19, 1973. In the Brief in Opposition Respondent argues under its fourth point that the case of *Norvell v. Sangre de Cristo Development Company, Inc.*, presently pending in the Federal District Court for the District of New Mexico "will provide a better decision for this Court to review on appeal or

certiorari". This is an argument first raised in the Brief in Opposition which Petitioners are responding to here pursuant to paragraph 4 of Rule 24 of this Court.

ARGUMENT

Two weeks prior to the filing of Respondent's Brief in Opposition, Judge Howard C. Bratton, the presiding judge in the case of *Norvell v. Sangre de Cristo Development Company, Inc.*, D.C.N.M., No. 9106, wrote a letter to all counsel of record vacating a March 26, 1973 trial setting in the case and stating:[1]

> "In the present posture of matters a number of the issues in the cause might be considered as calling for an advisory opinion. It is my judgment that it would be appropriate to vacate the present trial setting."

In view of Judge Bratton's action Petitioners fail to see how Respondent could argue to this Court that the *Norvell* case will provide a better decision for this Court to review on appeal or certiorari – assuming the issues presented in the *Norvell* case include the question presented in this case. The *Norvell* case may never be decided and, even if it is, Respondent has no substantial basis for the statement in its Brief in Opposition that the "judgment of the District Court [in the *Norvell* case] will inevitably be reviewed by this Court". This statement assumes an appeal to the Tenth Circuit followed by an appeal to, or a grant of certiorari by, this Court. Even if all of these assumed events took place in the *Norvell* case, they would take a year or two to happen. In the meantime, the important question presented by this case would go unresolved if the argument of Respondent were followed.

Furthermore, the *Norvell* case does not involve the New Mexico provisions, Sections 14-19-1 through 14-19-14, N.M.S.A., 1953 Comp., which Petitioners rely on in this case as their primary basis for claiming planning and platting authority and

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1. The Judge's letter is reproduced in full in Appendix A hereto. Counsel for Respondent in this case is also a counsel of record in the *Norvell* case.

subdivision control over the leasehold interest of Respondent and which provide the only basis for the claim of Petitioner City of Santa Fe. The only New Mexico provisions involved in both cases are Sections 70-3-1 through 70-3-9, N.M.S.A., 1953 Comp. (1971 Supp.) which purport to give counties certain platting authority.

Finally, if the Petition were denied in this case, it would become a final judgment which might prevent Petitioner Santa Fe County, a party plaintiff in the *Norvell* case, from claiming jurisdiction in the *Norvell* case over the leasehold interest of Respondent under Sections 70-3-1 through 70-3-9, N.M.S.A., 1953 Comp. In such event the issue would never be decided in the *Norvell* case and therefore never reviewed by a federal appellate court.

Accordingly, Petitioners submit that the pendency of the *Norvell* case, instead of providing a reason for denying the Petition, demonstrates the need for granting the Petition.

HARRY S. CONNELLY, JR.
Special Assistant City Attorney

Attorney for Petitioner
City of Santa Fe

JAMES B. ALLEY, JR.
Special Assistant District Attorney

Attorney for Petitioner
Board of County Commissioners

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103

HOWARD C. BRATTON
JUDGE

March 5, 1973

Re: David L. Norvell, Attorney General of the State of New Mexico –vs– Sangre De Cristo Development Company, Inc., a New Mexico corporation, et al. No. 9106 Civil

TO ALL COUNSEL IN THE ABOVE CAPTIONED CASE:

Gentlemen:

I have reconsidered the issue as to whether it would be advisable to proceed to a final hearing in the above cause at this time.

In the present posture of matters a number of the issues in the cause might be considered as calling for an advisory opinion. It is my judgment that it would be appropriate to vacate the present trial setting.

The trial setting of March 26, 1973 will be vacated. The matter will be reconsidered and your views solicited by June 1 as to the time of further proceedings in this action.

Very truly yours,

s/ Howard Bratton

Howard Bratton